FILE COPY.

FILED
FEB 20 1903
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1902.

CLINTON B. WISER, ET AL,
Appellants,
vs.
JOHN LAWLER, ET AL,
Respondents.

No. ~~192~~ 174

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

STATEMENT AND BRIEF

FOR RESPONDENTS LAWLER AND WELLS.

H. C. McDOUGAL,
W. C. SCARRITT,
Counsel.

E. L. SCARRITT,
Of Counsel.

(18,287)

EQUITABLE ESTOPPEL: ARE THE OWNERS OF MINES, WHOSE TITLE IS PROCLAIMED BY THE PUBLIC REGISTRY, TO BE DISPOSSESSED AND DEPRIVED OF THEIR PROPERTY BY REASON OF THEIR SILENCE AND INACTION UNDER THE CIRCUMSTANCES AND RELATED FACTS DISCLOSED BY THIS RECORD?

INDEX.

Page

Statement 3

Findings of Fact 49

Argument: Inquiry limited to certified facts 15

Lawler and Wells conduct blameless:

Registration imparted notice of defendants' rights 20

The Escrow Agreement customary and fair 19

The deed (in escrow) transferred no interest 21

The English prospectus immaterial 22

They exploited neither corporation 22

They were ignorant of false representations 23

They were under no obligation to speak 26

Plaintiffs were not justified in relying upon the alleged misrepresentations as to title:

Rules of trade considered 29

Legal possession of defendants notice of right 30

Representations as a whole indefinite 31

Plaintiffs were not reasonably misled 33

They acted without relying on anything said or done or omitted by defendants 33

Doctrine relating to Silence and Inaction 34

Defendants received no money from stock subscriptions after May 20th, 1893 43

Moneys paid Lawler and Wells under the Cowland contract are not impressed with a trust in favor of plaintiffs 44

Claim to improvements without equity 47

Conclusion 47

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1902.

CLINTON B. WISER, ET AL,
Appellants,
vs.
JOHN LAWLER, ET AL,
Respondents.

No. 434.

STATEMENT.

This is a suit in equity instituted in the District Court of Yavapai County, Arizona. From an adverse decision in that court the plaintiffs appealed to the Supreme Court of the Territory, where the judgment of the District Court was affirmed. A motion for a rehearing was made by them and denied. Upon their motion, the Supreme Court of the Territory made Findings of Fact, sixty-four in number, which are printed as an appendix to this brief. No errors in the admission or rejection of evidence have been excepted to by appellants or certified to this court by the court below.

The following admirable narrative of the facts of this case, which we adopt as our statement, is taken from the opinion of the Supreme Court of the Territory, by Doan, J. (Record p. 274)

"On and prior to the 12th day of May, 1892, John Lawler and Ed. W. Wells were the owners and in possession of the mines and mining claims located in the Eureka mining district in Yavapai County, Arizona, known as Hillside, Happy Jack, Contact No. 1, Contact No. 2, and Camp, and locations known as Midnight, Morning Glory, Water, Hidden Treasure, Sucker, Side, Purple Rose, Southern Belle, Robert E. Lee, Lucky Cuss, Centipede, and Good Enough, which are hereby denominated and will be hereinafter referred to as the "Hillside group of mines." The muniments of title showing such ownership in Lawler and Wells were then, and have been ever since, on record in the office of the recorder of said county of Yavapai, Territory of Arizona, where said mines are situate.

Lawler and Wells offered said mines for sale at the purchase price of $450,000 cash. A few days prior to May 12th, 1892, H. H. Warner visited this group of mines with T. A. Rickard, a mining expert, and examined the same. After such examination he contracted for the purchase of said group from Lawler and Wells for the sum of $450,000, paying $20,000 in cash, the remainder payable in installments, in accordance with the terms of an escrow agreement entered into on May 12, 1892, by and between John Lawler and Ed. W. Wells on the one part and Charles Cowland on the other part, which provided, among other things, that—

"The deed conveying the mine to Cowland be annexed to said agreement, and shall be held in escrow with the bank of Arizona, at Prescott, Arizona, to be held and delivered by the bank upon the following conditions only: The bank to deliver the deed to Cowland, his heirs or assigns, upon his or their paying or causing to be paid, as herein provided for, the full sum of $450,000. In case of failure of said Cowland in making, or causing to be made, any of said payments of money at the time or times and in the manner herein stated, then the said Bank of Arizona, upon demand being made thereupon by said Lawler and Wells, shall deliver said deed to Lawler and Wells, or their representatives; and, in the event of such failure of said Cowland to make or cause to be made any of the said payments, then all payments of money theretofore made by said Cowland on the purchase price of said property shall be forfeited by him and he agrees and covenants with said Lawler and Wells that all money paid by him as purchase money on said property shall belong to them, and be retained by them as liquidated damages accruing to them for the failure of said Cowland to purchase, take, and pay for said property as hereinabove stated and stipulated, and the said Lawler and Wells shall be at once released and discharged from any further duty or obligation to sell and convey the property.

"It is further agreed that said Cowland, by himself and his agents, may at once enter into and upon said property, and take possession thereof, subject however, to the legal possession of said Lawler and Wells; and the said Cowland may use, possess, explore, develop, work, and operate the said property; and all the proceeds derived from such use, development, operation, and working of the same, and from the ores taken therefrom shall be at once paid to said Lawler and Wells, and be applied to and credited upon the payment hereinabove stipulated to be made by said Cowland. It is further agreed that said Lawler and Wells shall retain and remain in possession of said property until the full payment of purchase price shall be made and Cowland recognizes and agrees to such possession, and any and all use made of, by, or on the part of the said Cowland shall be considered of said Lawler and Wells' possession as aforesaid. Lawler and Wells shall not work the said property, or operate the said mine, nor interfere with the use, working, and operation of said Cowland.

"It is further agreed that if the said Cowland shall fail to make the payments as above stated, and shall fail to take and pay for said property as above stated, that all improvements made on said property and all development made thereon and therein, and all ores taken therefrom, shall be the property of said Lawler and Wells, and shall not be removed by said Cowland, and the costs and expenses thereof shall in no manner be charged against said Lawler and Wells or against said property; that said Cowland shall have the right to work and operate the machinery and to use the property mentioned in said deed during the continuance of said contract and until the forfeiture thereof on his part; and in case of a forfeiture of contract on the part of said Cowland by failure to comply with any of the provisions thereof, or to make any payment as herein provided, then he agrees to at once surrender and deliver possession of said property to said Lawler and Wells."

On the 12th day of May, 1892, and contemporaneously with the execution of said agreement, a deed to the said Charles Cowland was executed by John Lawler and Ed. W. Wells and wife, particularly describing the said Hillside group of mines, and conveying the same to Cowland for the purchase price of $450,000. Contemporaneously with the signing of said agreement and deed, the said H. H. Warner signed an instrument in writing, guarantying that the said Charles Cowland will carry out and perform the conditions of said agreement above referred to. Afterwards, and on the same day, the agreement, deed, and instrument of guaranty were by the said Warner, John Lawler, and Ed. W. Wells deposited with the

Bank of Arizona at Prescott, as the escrow holder thereof, in accordance with the terms, conditions, and provisions contained in said escrow agreement. While the escrow agreement and deed were executed in the name of Charles Cowland, the said Cowland was the agent of H. H. Warner, and Warner was the real party in interest in the transaction. The escrow agreement, deed, and guaranty were never recorded, but remained in the possession of the bank, as the escrow holder thereof, until November 10, 1893.

About the 15th day of May, 1892, Lawler delivered to T. A. Rickard, as the agent of Cowland, the occupation of the said group of mines under the terms and conditions of the license contained in the escrow agreement, and the mines were operated until June 15th by and at the expense of the H. H. Warner Investment Company.

On the 14th day of June the said H. H. Warner, Charles Cowland, W. M. Earl, W. R. Kennard, and Frank B. Bowen organized and incorporated under the laws of New Jersey the Industrial Mining and Guaranty Company, with a capital of $500,000, for the purpose of handling mines and industrial enterprises, buying and selling stocks, etc.; and on the 15th day of June, 1892, said Charles Cowland transferred to the said Industrial Company his interest in the mining property involved in this suit for the purpose of handling, operating, and offering the same to the public, giving at that time to the said Industrial Mining and Guaranty Company a written assignment of all his right to said escrow agreement, and a deed to his interest in and to the said agreement between him and the said Lawler and Wells, together with his right, title, and interest in the property described therein, reciting the deposit in escrow of the said agreement and the accompanying deed of date of May 12, 1892, and stating that the Industrial Company is to have the same right as Cowland under said deed and agreement, and is made the agent of Cowland to perform the conditions and provisions of the agreement, and upon such performance to receive the deed. H. H. Warner, on said June 15th, made and delivered to the Industrial Mining and Guaranty Company his written consent to the making of said assignment and deed by Cowland. The Industrial Mining and Guaranty Company then, by resolution of the board of directors, assumed all the covenants, conditions, and agreements in the said escrow agreement of May 12, 1892, and promised to carry out and perform all the terms, conditions, and covenants contained therein on the part of Cowland, and to make the payment for said mines and mining property as provided for in the said escrow agreement. On the 15th day of June, 1892, T. A. Rickard delivered to the Industrial Mining and Guaranty Company the

occupation of said group of mines, and the company thereupon entered into such occupancy, and remained therein until the 1st day of October, 1892.

On the 15th day of August, 1892, said H. H. Warner, W. M. Earl, and one R. S. Hudspeth incorporated the Seven Stars Gold Mining Company, under the laws of New Jersey, with a capital of $3,000,000, the object and purpose of said corporation being to hold, operate, and convey mines. The said H. H. Warner was the president of the Industrial Mining and Guaranty Company, and was also a director in and president of the Seven Stars Gold Mining Company.

On September 10, 1892, the Industrial Mining and Guaranty Company, through its board of directors, offered to sell and convey all its right, title, and interest in the following mining properties, a portion of which are described in the escrow agreement and deed, to-wit, the "Seven Stars," "Happy Jack," "Contact No. 1," "Contact No. 2" mines, and the claim known as "Camp," and the locations known as "Mescal," "Elwood," "Midnight," "Waterfall," and "Boulder," to a company formed, or to be formed, and known as the Seven Stars Gold Mining Company, upon said company showing that it had placed $200,000 for working capital in its treasury, and upon receiving $2,800,000 in cash or stock in the Seven Stars Gold Mining Company.

On the 1st day of October, 1892, the Industrial Mining and Guaranty Company placed the Seven Stars Gold Mining Company in occupation of the Hillside group of mines, and said latter company thereupon entered into such occupancy under the terms, conditions, and provisions contained in the escrow agreement of May 12, 1892, by the authority of the resolution of the board of directors of the Industrial Mining and Guaranty Company, just quoted.

The Industrial Mining and Guaranty Company as the agent of the Seven Stars Gold Mining Company, under date of September 24, 1892, issued a prospectus, known as the "American Prospectus," to promote the sale of the stock of the Seven Stars Gold Mining Company, and circulated the same extensively throughout the United States. The circulation began about the 20th day of September, 1892.

On October 3rd, 1892, the Industrial Mining and Guaranty Company, as agent for the Seven Stars Gold Mining Company, authorized and directed an English prospectus to be issued, but such prospectus was not in fact ever issued or circulated in England or elsewhere. A prospectus was issued and circulated in England without the authority

of the Industrial Mining and Guaranty Company or the Seven Stars Gold Mining Company. Such prospectus was prepared, supervised and circulated by Charles Cowland. The descriptive matter in the prospectus was based upon data furnished by the officers of the Industrial Mining and Guaranty Company. The circulation commenced about October 5, 1892, and amounted to 80,000 copies.

On the 15th day of May, 1892, at the Hillside mines, Lawler and Wells delivered to T. A. Rickard a report previously made upon said mines, known as the "Blauvelt Report," together with a map of the underground workings of said mines, as such workings then existed, known as the "Blauvelt Map;" also copies of smelter and milling returns of ore which had been previously shipped from said mines and reduced, and known as "smelter returns." On September 28, 1892, at the request of H. H. Warner, Lawler sent by express to Warner, in New York City, the original of said smelting and milling returns.

On August 27, 1892, Ed. W. Wells visited the office of the Industrial Mining and Guaranty Company in New York City, and had an interview with H. H. Warner, president of that company and of the Seven Stars Gold Mining Company. On the 30th day of August, and between that day and September 3, 1892, John Lawler was in the office of the Industrial Mining and Guaranty Company in New York City, and learned that the American prospectus was being prepared for circulation for the purpose of promoting the sale of the stock of the Seven Stars Gold Mining Company, and also became aware that the Blauvelt reports and map and copies of the smelter returns were being used as a basis of description of the Hillside group of mines to be contained in the proposed prospectus.

On October 28, 1892, H. H. Warner, in Prescott, represented to Lawler and Wells that he was unable to place securities that he held in time to meet the payment of that portion of the purchase price falling due November 12, 1892; and, relying upon said representations, on request of Warner, Lawler and Wells, on October 28, 1892, agreed to an extension of the time of payment under the agreement of May 12, 1892, and provided that the original agreement remain in full force except as to said modification touching the time of payment.

On May 8th, 1893, Warner made a general assignment of his property for the benefit of his creditors, and on May 11th, 1893, Lawler and Wells, knowing of the assignment of Warner, executed an agreement with Charles

Cowland, stipulating that the payment mentioned in the original escrow agreement as falling due on May 12, 1893, may be made by said Cowland as follows: $9,098 in cash, and $4,500 to be paid on the 1st day of June, 1893, and the like sum to be paid on the 1st day of each of the following months, viz.: July, August, September, October and November. A part of the consideration for the agreement for the extension of the time of payment was the issuance and delivery to Lawler and Wells of $50,000, par value, of the guaranteed capital stock of the Seven Stars Gold Mining Company, and the appointment of John Lawler manager of operation of the Hillside group of mines; and John Lawler, on May 13, 1893, entered upon his duties as such manager.

On the 18th day of August, 1893, the chancery court of New Jersey appointed John Griffin receiver of the Industrial Mining and Guaranty Company, and the said John Griffin qualified and entered upon his duties as receiver that day.

The Seven Stars Gold Mining Company, from October 1, 1892, until August 17, 1893, continued to occupy and operate the Hillside group of mines under and by virtue of the occupation thereof so given to it by the Industrial Mining and Guaranty Company under the terms, conditions, and provisions contained in the escrow agreement of May 12, 1892.

On September 1st, 1893, neither Charles Cowland, nor the said recevier, nor the plaintiffs, nor any one of them, paid or offered to pay to Lawler and Wells the sum of $4,500, payable on that day, according to the terms and conditions of the aforesaid escrow agreement and modifications thereof; nor has Cowland, nor has any one for him, paid said sum since said date; nor has Cowland, or any one for him, paid or caused to be paid any portion of any purchase money of said property falling due or payable on or after the 1st day of September, 1893, according to the terms and conditions of said escrow agreement of May 12, 1892.

On the 10th day of September, 1893, Lawler and Wells, as owners of the legal title of the said Hillside group of mines, and claiming to exercise their rights under the escrow agreement of May 12th, 1892, entered into possession of said Hillside group of mines, and from thenceforward until September 30th, 1897, continued to remain in possession of said mines.

On the 10th day of November, 1893, the Bank of Arizona, as escrow holder of the escrow agreement and deed dated May 12, 1892, at the request of Lawler and Wells, redelivered said deed,

according to the terms of the escrow agreement, to the said Lawler and Wells.

From the gross proceeds of operation of the mines by the Industrial Mining and Guaranty Company there was deposited in the bank of Arizona, to the credit of Lawler and Wells, on account of the purchase price, in accordance with the escrow agreement of May 12, 1892, the sum of $19,987.61. During the operation of said property by the Seven Stars Gold Mining Company, a like deposit was made for the same purpose, amounting to $47,812.25, aggregating the sum of $67,799.86. On May 12 and 24, 1892, H. H. Warner paid Lawler and Wells, on account of the purchase price of said property, the sum of $51,000, and there was paid on and between November 12, 1892, and August 4, 1893, to Lawler and Wells, on account of the purchase price of said property, under the terms of the escrow agreement, various sums, aggregating the amount of $112,339.96.

During the life of the Industrial Mining and Guaranty Company it was engaged in promoting sundry mining, railroad, and industrial enterprises, including the business transactions of the Seven Stars Gold Mining Company. During that time it received and disbursed the sum of $824,142.13. From June 15, 1892, to and including August 1, 1893, the moneys which it received and disbursed on account of its various enterprises were all deposited in its name in a common fund in the Continental National Bank of New York City, and checked against, used, and disbursed by it in its various enterprises as required therein, excepting the sum of $111,724.23, of which sum $67,799.86 were the gross proceeds of the ore from the Hillside group of mines, and the further sum of $43,924.37, which is composed of $224.37, money received prior to May 11, 1893, from the sale of the Seven Stars Gold Mining Company stock, and the remainder from loans obtained by said company subsequent to May 11, 1893. Lawler and Wells did not at any time prior to the commencement of this action have any knowledge or notice that any money received by them on account of the purchase price of the Hillside group of mines, as provided for in the escrow agreement of May 12, 1892, came from the money or was any part of the money which any one or more of the purchasers of the stock of the Seven Stars Gold Mining Company had paid into the Industrial Mining and Guaranty Company on account of the purchase price of said stock.

Lawler and Wells were not the promoters of, nor in any wise interested in, the organization of the Industrial Mining and Guaranty Company, nor the Seven Stars Gold Mining Company, nor in the issuance or circulation of the prospectus, nor in the issuance or sale of the capital stock of either of said companies, nor in the proceeds thereof. After the 11th day of May, 1893, the Industrial Mining and Guaranty Company received the sum of $500, and no more, from the sale of the stock of the Seven Stars Gold Mining Company. The amount received by the Industrial Mining and Guaranty Company from the sale of the guaranteed stock of the Seven Stars Gold Mining Company aggregated $253,128.05, of which sum $819.08 was returned to the subscribers, and the stock canceled, making the amount of money retained by the Industrial Mining and Guaranty Company from the sale of guaranteed stock $252,308.97. There was received from the sale of common stock of the Seven Stars Gold Mining Company $2,583.89. The Seven Stars Gold Mining Company did not keep any books of account of receipts and expenditures of money in the New York office, but all the receipts and expenditures of money on account of the operation and expenditures of the Industrial Mining and Guaranty Company and the Seven Stars Gold Mining Company during their respective operation of the Hillside group of mines were kept by the Industrial Mining and Guaranty Company in its own books of account.

The Industrial Mining and Guaranty Company, between the 15th day of June, 1892, and the 18th day of September, 1893, paid out for the operating expenses and purchase of machinery and purchase price of the Hillside group of mines, dividends, and other expenses, the aggregate sum of $380,259.81, which amounted to $127,986.84 more than the amount of money received by it from the sale of the Seven Stars stock, and $60,186.98 more than the aggregate amount of money received by it from the sale of stock and from the net proceeds of ore from the Hillside group of mines. During the operation of the said Hillside group of mines by the Seven Stars Gold Mining Company there was expended by the Industrial Mining and Guaranty Company for costs of operation, improvements, supplies, and machinery the sum of $112,411.32. On and between January 13, 1893, and May 10, 1893, the Industrial Mining and Guaranty Company paid out for dividends on stock sold of the Seven Stars Gold Mining Company the sum of $11,533.07 to holders of stock of the Seven Stars Gold Mining Company.

The holders of stock of the Seven Stars Gold Mining Company did not, nor did any of them, before the commencement of this suit, return or offer to return to the Seven Stars Gold Mining Company his stock, or any part thereof. Neither said stockholders, nor any one of them, prior to the commencement of the action, returned or offered to return his or their portion of the dividends received by him or them from the Industrial Mining and Guaranty Company.

There was never any meeting called or held of the stockholders of said Seven Stars Gold Mining Company, but on April 4, 1893, several stockholders, representing themselves and about three hundred others, voluntarily met at Jersey City, and there made demand upon John Griffin, receiver, to commence this suit, and he refused so to do.

On and between the 20th of September, 1893, and September 30, 1897, Lawler and Wells received from the operations of the Hillside group of mines the sum of $37,376.86, and disbursed in such operations during that time the sum of $35,658.93. Between November 17, 1893, and the commencement of this action the plaintiffs, or said receiver, or any one of them, or either of them, did not make any demand upon Lawler and Wells for the possession of the properties in controversy, or any part thereof.

In 1895, C. B. Wiser and 20 others, stockholders in the Seven Stars Gold Mining Company, brought suit against Lawler and Wells and others in the district court of Yavapai county, setting up the facts, and alleging that the representations of ownership as set forth in the prospectus issued September, 1892, were false and fraudulent, and that plaintiffs were misled thereby; that Lawler and Wells assisted in the preparation and circulation of the said prospectus; and prayed that the court decree Lawler and Wells to have, by their conduct, estopped themselves, as against the plaintiffs and others in like estate, from asserting that the Seven Stars Gold Mining Company is not the owner of the mines and mining property described in the prospectus and pictured on the map, requesting a provision in the said decree for an accounting, and a money judgment against Lawler and Wells upon such accounting for all the proceeds and value of ore, bullion, and other property taken from the mines and mining property and received by the said Lawler and Wells between the 12th day of May, 1892, and the date of entry of final decree, together with a money judgment against Lawler and Wells for all damages caused by them to said mines and mining property; or that the court decree that the said plaintiffs and

all others in like estate may have and recover from the said Lawler and Wells the aggregate amount of money paid by plaintiffs and others in like estate for stock in the Seven Stars Gold Mining Company; and for other relief.

On May 13th, 1896, after taking part of the evidence, the plaintiffs amended the bill to conform to the proofs. To this amended complaint Lawler and Wells filed general and special demurrers and a plea of estoppel in the nature of an answer. Receiver Griffin filed a short answer. The Seven Stars Gold Mining Company and the Industrial Mining and Guaranty Company were adjudged in default for want of answer.

On September 22nd, 1897, the cause came on for hearing before Hon. H. C. Truesdale, presiding judge. Depositions were read, witnesses examined, documents offered in evidence, and the cause exhaustively argued. Thereupon the court entered an interlocutory decree in favor of plaintiffs, calling for an accounting before a master in chancery, and appointing a receiver for the property. Pending an accounting before the special master, Judge Truesdale died. The case was then assigned to Hon. Webster Street. The report of the special master was returned July 8, 1898. On July 12, 1898, the cause was further heard before his Honor, Webster Street, on the report of the special master in chancery and the report of the receiver. The report was by the court examined and approved. The resignation of the receiver was accepted, and the sureties on his bond discharged from liability, and Lawler and Wells, with consent of plaintiffs, were appointed receivers, without compensation, and judgment and final decree were entered in favor of plaintiffs in accordance with the findings and conclusions of Judge Truesdale, and Lawler and Wells filed a motion for a new trial. After full argument thereon, on October 22, 1898, the motion for a new trial was granted.

On November 1, 1898, by consent, the prayer of the complaint having in the meantime been amended, the case was submitted for decision to Judge Street upon the pleadings and the evidence then in the record, and upon the arguments made on the motion for a new trial, whereupon the court held that plainitffs were entitled to no relief, and ordered the dismissal of the complaint. The dismissal carried the cross bill with it. Findings of fact and conclusions of law were made and filed in the case by the court, and a decree in accordance therewith entered, and the motion (of plaintiffs) for a new trial was denied."

From this judgment the plaintiffs appealed to the Supreme Court of the Territory. The judgment of the District Court was, after elaborate argument, both at the hearing of the case and

upon a motion for rehearing, affirmed by the Supreme Court of the Territory. And plaintiffs have prosecuted their appeal from that judgment to this court.

No assignment of errors is to be found in the record.

The Supreme Court of the Territory having found and certified the facts to this court, and there being no exceptions to the rulings of either of the territorial courts upon the admission or rejection of evidence, the issue, and the only issue, before this Court for determination is:

Under the pleadings and upon the facts found by the Supreme Court of Arizona is the decree of that Court for the right party?

BRIEF.

I.

On appeal from the Supreme Court of a territory this court is without power to re-examine the facts, and can only determine whether the court below erred in the conclusions of law deduced by it from the facts as found, and review the errors in admitting or rejecting evidence duly excepted to, if any.

Act of April 7th, 1874, 18 U. S. Stat. at L. 27, 28.

That statute provides in regard to appeals from territorial courts to this court:

"On appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal."

The Supreme Court of the Territory made a full Finding of Facts (Appendix, pp.49-65); and no ruling of the trial court on the admission or rejection of evidence was excepted to, or certified by the court below.

The following cases construe the act and define the jurisdiction of this court in cases before it on appeal from territorial courts.

In *Harrison* v. *Perea,* 168 U. S. 311, Mr. Justice Peckham, delivering the opinion of the court, said:

"Our further examination must proceed upon the finding of facts as made by the court below, for this being an appeal from the Supreme Court of a territory, those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Stringfellow* v. *Cain,* 99 U. S., 610: *Neslin* v. *Wells,* 104 U. S., 428: *Eilers* v. *Boatman,* 111 U. S., 356: *Idaho and Oregon Land Improv. Company* v. *Bradbury,* 132 U. S.,

509; *Mammoth Mining Company* v. *Salt Lake Foundry and Machine Company*, 151 U. S., 447, 450: *Haws* v. *Victoria Copper Mining Company*, 160 U. S., 303: *Gildersleeve* v. *New Mexico Mining Company*, 161 U. S., 573: *Bear Lake and River Water Works and Irrigation Company* v. *Garland*, 164 U. S., 1."

In *San Pedro and Canon Del Agua Co.* v. *United States*, 146 U. S., 120, Mr. Justice Brewer, delivering the opinion of the court, said:

"The Supreme Court of the Territory, at the request of the defendant, made and certified a statement of the facts in the case. This is in accordance with the act of April 7th, 1874 (18 Stat. L. 27), which, in section 2, a section providing for the exercise of the appellate jurisdiction of this court over the judgments and decrees of territorial courts reads: 'That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree.' Construing this statute, it was held, in the case of *Idaho and O. Land Imp. Co.* v. *Bradbury*, 132 U. S., 509, 514, that, 'the authority of this court, on appeal from a territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. *Stringfellow* v. *Cain*, 99 U. S., 610; *Cannon* v. *Pratt*, 99 U. S., 619; *Neslin* v. *Wells*, 104 U. S., 428: *Hecht* v. *Boughton*, 105 U. S., 235, 236; *Gray* v. *Howe*, 108 U. S., 12; *Eilers* v. *Boatman*, 111 U. S., 356; *Zeckendorf* v. *Johnson*, 123 U. S., 617.' Hence, notwithstanding the large volume of testimony taken and used in the court below has been incorporated into the record sent to us, we are not at liberty to review that testimony for the purpose of ascertaining whether the findings in the statement of facts are or are not in accordance with the weight of the evidence. This narrows materially the range of our inquiry."

In *Idaho and Oregon Land Improvement Company* v. *Bradbury*, 132 U. S., 509, Mr. Justice Gray, for the court, said:

"Congress has prescribed that the appellate jurisdiction of this court over 'judgments and decrees' of the territorial courts, 'in cases of trial by jury, shall be exercised by writ of error, and

in all other cases by appeal,' and 'on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified to by the court below,' and transmitted to this court with the transcript of the record. Act of April 7, 1874, chap. 80, section 2 (18 Stat. 27, 28).

"The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite: 'We are not to consider the testimony in any case. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' *Hecht* v. *Boughton*, 105 U. S., 235, 236."

Zeckendorf v. *Johnson*, 123 U. S., 617: *The Mammoth Mining Company* v. *The Salt Lake Foundry and Machine Company*, 151 U. S., 447: *Grayson* v. *Lynch*, 163 U. S., 468: *Holloway* v. *Dunham*, 170 U. S., 615: *Young* v. *Amy*, 171 U. S., 184.

In *Armijo* v. *Armijo*, 181 U. S., 558, Mr. Justice Peckham delivering the opinion of the court, said:

"In the absence of any findings by the Supreme Court of the Territory and also, being without anything in the nature of a bill of exceptions, we have nothing on which to base a reversal of the judgment in this case."

In *Marshall* v. *Burtis*, 172 U. S., 630, there was no statement of facts in the record, either from the District Court or Supreme Court of the Territory, and upon the assumption that the judgment of the territorial courts was justified by the evidence, the judgment of the Supreme Court of the Territory was by this court affirmed. Mr. Justice McKenna, for the court construing this statute, said:

"The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite: 'We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' *Hecht* v. *Boughton*, 105 U. S., 235, 236."

The reference made and persisted in throughout the appellants' brief to the discarded findings of fact of his Honor, Judge Truesdale, and the expressed views of that judge as to the effect of certain evidence, and the reference to or recitations of facts found by that judge in the defendants' motion for a new trial, can not strengthen appellants' position here for those statements are not within the compass of the inquiry of this court. The effect of these false premises is diffused through much of the argument. Instead of adding to the confusion by an analysis and dissection of the argument in the effort to eliminate the force of unsubstantial facts we shall content ourselves in the security which comes from the consciousness that this court will prove every asserted fact by the record, and will separate the tares from the wheat, though "both grow together until the harvest." And we submit that the printed brief would betray a better confidence in the merits of the controversy, and a higher conception of the duties of a lawyer, and a more sincere appreciation of the worth of the court to whom it is addressed by being confined to facts of which the court upon the record and under the law can take notice.

II.

The terms of the escrow agreement with the deed attached were explicit and fair. It was an agreement between competent parties, who were men of business experience. It stated clearly (a) the conditions on which the deed was to be delivered; (b) the terms of the license for the occupation and operation of the mine and the use of the machinery by Cowland and his agents.

It is to be remembered that the agreement contains no promise either on the part of Cowland or Warner to pay the price of the mine. Its effect is that upon payment of the fixed price at the times stated the mine shall be conveyed to Cowland.

(1) Such an agreement was usual and customary as to its terms and was well adapted to effectuate the intention of the parties concerning these mining properties. Time is held to be of the essence of such contracts; and their stipulations as to liquidated damages in the nature of forfeitures are regarded with favor, and are protected and enforced by law and equity courts. *Settle* v. *Winters*, 2 Idaho, 199; *MacBryde* v. *Weekes*, 22 Beav. 533; *Waterman* v. *Banks*, 144 U. S. 394; *Cheney* v. *Libby*, 134 U. S. 68; *Slater* v. *Emerson*, 19 How. 224.

Fry on Specific Performance, Sec. 716, says:

"The nature of all mining transactions is such as to render time essential; for no science, foresight, or examination can afford a sure guaranty against sudden loss, disappointment, and reverses; and a person claiming an interest in such an undertaking ought, therefore, to show himself in good time willing to partake of the possible loss as well as profit."

It is said in *Baum's Appeal*, 113 Pa. St. 58; l. c. 65:

"The nature of nearly all mining contracts is such as to render time essential, and in several cases it has been held of the essence of contracts for the sale of mines and works."

Indeed, this record shows that throughout this entire transaction the conduct of Lawler and Wells, while directed by high intelligence, is marked by a commendable spirit of leniency and efforts to relieve from loss all persons directly concerned in the transaction so far as is consistent with their substantial rights under the original contract. They granted Warner an extension on a part of the payment due November 12th, 1892. (Finding 21.) After the failure of Warner, on May 11th, 1893 they granted Cowland an extension upon the payment then about to become due; and it was not until after default had been made and it became apparent to every one connected with the transaction that

the terms of the escrow agreement could not be complied with that they took possession of the mine pursuant to the terms of that contract, on September 10th, 1893. (Finding 32.) In their cross complaint, Lawler and Wells tender to the Court and offer to deliver a deed and the possession of the said mines upon the payment of the balance due them under the escrow agreement. (Printed record p. 83.) And the plaintiffs, in their reply to that pleading, "refuse the tender of said Lawler and Wells in said cross complaint set forth." (Printed Record, p. 101.)

(2) The record title to the mines being in Lawler and Wells (Finding 1), and that record imparting notice to all the world of their ownership (R. S. Arizona, Sec. 2603*), the escrow agreement being fair and usual to the business transaction involved and not filed for record, the act of Lawler and Wells in executing that agreement and depositing it in escrow under the circumstances in which it was done, is utterly devoid of suspicion of bad faith, or of any purpose or intention to deceive, or to entrap any one into parting with his money for nothing. Nor can the fact that Lawler and Wells knew that Warner contemplated forming a corporation to operate the mines and "eventually vest the title thereto in said corporation in compliance with the terms of said escrow agreement,". (Finding 6), or that Lawler, about the first of September, 1892, became aware that an "American prospectus was *being prepared* for circulation for the purpose of promoting the sale of the Seven Stars Gold Mining Company" (Finding 20), and that the Blauvelt report and map and copies of the smelter returns, which had been delivered by Lawler and Wells to Cowland's agent on May 15th, 1892 (Finding 17), were being used as a basis of the description of said mines for the prospectus, detract in any degree from the honor and good faith of Lawler and Wells in respect to the execution of that contract. It is not charged in the bill nor intimated in the entire record that the facts recited in the Blauvelt report and map and smelter returns are not true.

The delivery of the occupation of the mines (Finding 7), under the terms of the license embodied in the escrow agreement, is

---

*R. S. *Arizona*, 1887, Sec. 2603. "Every conveyance, covenant, agreement, deed, deed of trust, or mortgage in this act mentioned, which shall be acknowledged, proved or certified according to law, and delivered to the recorder of the proper county to be recorded, shall take effect and be valid as to all subsequent purchasers for a valuable consideration, without notice, and as to all creditors, from the time when such instrument shall be so acknowledged, proved and certified, and delivered to such recorder to be recorded, and from that time only."

likewise, when considered in connection with what had gone before it and the relationship of the parties to the transaction when it occurred, for it must be remembered this delivery was within three days of the date of the escrow agreement, a lawful transaction and innocent of any intent to mislead or beguile any person in regard to the ownership of the mines. The contract provided for such occupation, that is, that the licensees' possession should be subject to the legal possession of said Lawler and Wells; for "it is further agreed that said Lawler and Wells shall retain and remain in possession of said property until full payment of the purchase price shall be made; and Cowland recognizes and agrees to such possession; and any and all use made of it by or on the part of said Cowland shall be considered as said Lawler and Wells possession, as aforesaid." (Finding 3.)

(3) The deed, while in escrow, conveyed or vested no interest in the land.

In *Gaston* v. *City of Portland,* 16 Oregon, 255, l. c. 259, it is said:

"It is elementary that a delivery is essential to the execution of a deed, and until delivered it is no deed. A deed may be delivered as an escrow to any person other than the grantee, and does not become a conveyance so long as it remains in that condition or until the condition is performed upon which it is to take effect."

In *Murray* v. *Stair,* 2 Barn. & C. 87, it is said by Abbott, C. J.:

"But if the delivery itself at the time was conditional, so as not to constitute any present obligation, it was an escrow or writing merely and not a deed; and the condition of the delivery having been broken, it had never become the deed of the defendant."

In *Daggett* v. *Daggett,* 143 Mass. 516, l. c. 520, it is said:

"When a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. The transaction is incomplete. It is not the grantor's deed until the second delivery. * * * The depositary has no authority to waive such performance, and an unauthorized delivery by him of the deed which he holds in escrow is entirely ineffectual to pass the title."

The occupation of the mine under a mere license transferred no interest in the mine.

It is held in *Silsby* v. *Trotter,* 29 N. J. Eq. 228, that a mere grant of a right to take ore, no estate or interest being granted,

is a license only and is not exclusive of the licensor unless the expressed intention of the parties is otherwise, or the implication is so clear and strong as to be unavoidable. The license to mine is a mere incorporal hereditament. *Boone* v. *Stover*, 66 Mo. 430; *Bainbridge on Mines*, p. 300.

(4) The English prospectus is not a material fact to this controversy.

It is found that "neither John Lawler nor Ed. W. Wells had any knowledge or information that this prospectus had been or was being circulated in England, nor had any knowledge or notice of its contents until sometime in the month of October, 1893." (Finding 16.) At that date the facts upon which it is sought in this suit to establish a cause of action had passed into history. The plaintiffs had long before acquired their stock and a month previously Lawler and Wells had taken exclusive possession of the mines conformable to the terms of the escrow agreement. And no certificates of stock were ever issued on account of the stock subscriptions made in England. (Finding 52.)

(5) Lawler and Wells were not the promoters of, or in any way interested in, the organization of the Industrial & Mining Guaranty Company, the Seven Stars Gold Mining Company, or in the issuance and circulation of the prospectus, or in the issuance and sale of the capital stock of either of said companies, or in the proceeds thereof. (Finding 51.)

They had no knowledge prior to the institution of the suit that any moneys received by them on the purchase price of the mines came from or was the money or any part of the money which was paid by any particular stockholder for the stock of these companies. (Finding 50.) While Lawler was notified first on May 20, 1893, that remittances on the Cowland contract were being made from money derived from the sale of stock of the corporation (Finding 26), it is an undisputed fact that no such stock was subscribed or paid for after May 15, 1893, and there is no finding that any stock was subscribed or paid for after May 20, 1893.

They were neither present when negotiations for the purchase or contracts of sale were being had or made, nor had any part in any contracts for the sale of such stock. (Finding 41.) They had no knowledge that Cowland had attempted to convey the mines with the consent of Warner to the Industrial & Mining Guaranty Company (Finding 34), or that the latter company had offered to sell a portion of this property to the Seven Stars Gold Mining Company pe. (Finding 35.)

The part of the escrow agreement relating to the occupation and operation of the mines was a personal one, running to Cowland and *his agents,* and the knowledge of Lawler and Wells that the Gold Company was operating the mines, in the absence of any knowledge on their part of the conveyance from Cowland to the Industrial Company, and from the Industrial Company to the Gold Company, would carry with it the presumption that the Gold Company was operating as the agent of Cowland; for when the act of an individual is as clearly consistent with lawful as with unlawful conduct, the presumption would be indulged that the conduct involving the act was unlawful.

III.

Upon this record it cannot be asserted that Lawler and Wells made any misrepresentations or suggested any inducement whereby the plaintiffs were led to invest in the stock of the mining company. And, we assert, after a careful consideration of all the findings of fact, that unless the fact that Lawler and Wells, in the month of October, 1892, became aware that the American prospectus *was being distributed* by the Industrial Company and thereafter remained silent as to their ownership of the mine (Findings 37 and 38), constituted unconscientious conduct on their part; unless their silence and inaction constituted conduct grossly careless and negligent, considered in relation to the contextural facts then known to them; that is, unless the conduct was so careless and negligent as to brand them with a fraudulent intent, then that silence and inaction constituted no sufficient basis for the invocation of the doctrine of estoppel as sought to be applied in this case.

Assuming this proposition to state a correct principle of law, and we shall refer to some authorities supporting it in a subsequent part of this brief, we submit that,

(a) The Findings of Facts do not show that Lawler and Wells knew of any false statement in the prospectus.

There is no such thing as an estoppel in pais for neglecting to speak or act where the party did not know the facts, which if known, would have made it his duty to speak. *Delaplaine* v. *Hitchcock,* 6 Hill, 14, l. c. 17; *Acton* v. *Dooley,* 74 Mo. 63; *Galbreath* v. *Newton,* 30 Mo. App. 380, l. c. 399; *Biddle Boggs* v. *Merced Mining Co.,* 14 Cal. 279, l. c. 368.

The prospectus was a mere advertisement emanating from a corporation in which these gentlemen were in no way interested; nor were they concerned as to the result of that advertisement. They were men of affairs. Defendant Wells was a member of the Territorial Supreme Court. They believed Mr. Warner to be a man of integrity and business ability and of great wealth. They were under no duty or obligation to read the prospectus.

And that:

(b) The knowledge of a false statement contained in that prospectus cannot be implied from the fact that these defendants were aware that such prospectus was being distributed.

The knowledge of the distribution of the prospectus is easily reconcilable with the absence of knowledge of its contents. If we assume the prospectus came *into the hand* of Lawler and Wells (which is not found, nor is any fact found from which it should be implied), that fact alone will not raise the presumption that they had knowledge of the vague and scattered phrases relied upon by complainants as the basis of the alleged fraud. The prospectus is voluminous. (Original Record pp. 37 to 51, inclusive: Printed Record pp. 18 to 25, inclusive.) Its striking features are the guaranty of quarterly dividends of 15 per cent per annum, payable in gold, together with an agreement to redeem the stock at par at the expiration of two years. This guaranty and agreement were underwritten by the "Honorable H. H. Warner, of Warner Safe Cure fame," who had agreed to take 100,000 shares of the company of the par value of $500,000, and who was believed at that time, at least by Lawler and Wells, to have been financially able to make good his several obligations. Mr. Warner's agreement for the benefit of the subscribers to stock, as recited in the prospectus, was to deposit in trust bonds or stocks consisting only of such securities as are dealt in on the New York and London stock exchanges to an amount necessary to provide for the full payment of the five years dividends so guaranteed on all stock allotted on those subscriptions. The names of numerous well known and highly esteemed gentlemen were recited as directors, among whom was an Ex-United States Senator.

(c) Suppose they had opened the advertising circular which purported to be issued under date of September 24, 1892, and under title of "Objects," found the words, "This company is formed *to acquire* without further expense or liability to subscribers, on October 1st, 1892, as a going concern and *to provide* a working capital of $200,000 to further equip and develop" certain mines, that language would have made it perfectly clear to them that no attempt was being made to invade their rights in the mines, as

established and proclaimed by the recorded muniments of the title. And we submit that the only words in the whole prospectus that would have been subject to criticism by Lawler and Wells, had they read them, were the words in small type, "belonging to," at the bottom of the map, which was at the end of the prospectus, between the words in large type, "Group of Mines" and "Seven Stars Gold Mining Company." This map was a copy of a true map with which Lawler was familiar, but which did not have upon it the words "belonging to the Seven Stars Gold Mining Company."

We submit that on becoming aware of the existence and circulation of the advertising mining prospectus of fourteen pages, a busy man, who owned mines and whose title was of record, and who had entered into a written contract to sell them on certain expressed conditions to a man believed to be honorable and solvent and who had no interest whatever in the mining corporation formed for the purpose of taking title thereto eventually in compliance with the contract of sale, is not presumed to have knowledge of every statement contained in that prospectus.

The finding of fact, and the only fact disclosed by the record in this respect, is, "that the defendants, John Lawler and Ed. W. Wells, in the month of October, 1892, became aware that the American prospectus, "Exhibit D" to the original complaint, *was being distributed* by the Industrial & Mining Guaranty Company." (Finding 37.)

This Court has no authority to enlarge on the findings of fact certified by the Territorial Court; and in the absence of facts so certified rendering the judgment of the territorial court erroneous, the judgment should be affirmed.

It is said in *Marshall* v. *Burtis,* 172 U. S., 630, in respect to the jurisdiction of this Court on appeals from territorial courts:

"The necessary effect of this enactment is that no judgment or decree of the highest court of the territory can be reviewed by this court in matter of fact, but only in matter of law."

Where a special finding is silent upon a material fact, it is deemed a finding as to that fact against the party who has the burden of proof. *Dodge* v. *Pope,* 93 Ind. 480.

It is said in *Armijo* v. *Armijo,* 181 U. S. 558:

"In the absence of any findings of the Supreme Court of the territory and also being without anything in the nature of a bill of exceptions, we have nothing on which to base the reversal of the judgment in this case."

(d) Let us assume, for the argument merely, and not in fact, that Lawler and Wells did become aware of every word of

the contents of this prospectus at the time they learned of its circulation, and on that assumption consider their relation and obligations to the plaintiffs and the plaintiffs' obligations to them.

Muniments of title showing absolute right in Lawler and Wells to all the mining property involved were of record in the recorder's office of the county in which the mines were situated; and under the laws of the territory this record imputed notice to all the world of that ownership. The substance of such a law is not the expression of a local policy, but is conformable to a general policy prevalent throughout the civilized world. Also, the rule obtains throughout the United States, founded on either statute or common law, that real estate and the estates therein are assigned or created only by written instruments. This rule exists in conjunction with, and is the reason for, the rule as to the official record imparting notice.

The prevalent rule in America is that the mere silence or inaction of one who holds the record title to real property will not estop him from asserting his title thereto as evidenced and proclaimed by the public records. The rule is stated by Mr. Bigelow, in his work on estoppel, in this language (p. 575):

"It is well settled law that standing by in silence will not bar a man from asserting a title of record in the public registry, or other like office, so long as no act is done to mislead the other party; there is no duty to speak in such case." Citing *inter alia*, *Kingman* v. *Graham*, 51 Wis. 232; *Rice* v. *Dewey*, 54 Barber, 455; *Sulphine* v. *Dunbar*, 55 Miss. 255; *Mayo* v. *Cartwright*, 30 Ark. 407; *Knouff* v. *Thompson*, 16 Pa. St. 357; *Markham* v. *O'Connor*, 52 Ga. 183.

"These and many other cases to the same effect, proceed upon the ground, of course, that the silence of the party supposed to be estopped to assert his rights was no breach of duty to the person who asserted the estoppel. The latter had not, in contemplation of law been misled by the former's silence, and it follows that it is not enough to raise an estoppel that there was an opportunity to speak which was not embraced; there must have been an imperative duty to speak. Nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice if the true state of things is not disclosed. To use an apt illustration of one of the judges, a man may become apprised of the fact that his name has been forged to a negotiable instrument and so become aware that some one may be led to purchase the paper by supposing the signature to be genuine, and yet he is not bound to proceed against the forger or to take any steps to protect the

interests of others whose claims he may know nothing of. So long as he is not brought in contact with the person about to act and does not know who that person may be, he is under no obligation to seek him out or to stop the transaction which is not due to his own conduct, as the natural and obvious result of it." *Bigelow on Estoppel,* p. 575-6, citing, *Viele* v. *Judson,* 82 N. Y. 32, l. c. 40; *McKenzie* v. *British L. Co.,* 6 Appeal Cases, 82; *Leather Mfg. Bank* v. *Morgan,* 117 U. S. 96; *People* v. *Bank of North America,* 75 N. Y. 548, l. c. 560.

"In order that the owner of property which another has assumed to convey without authority may be precluded by silence from subsequently claiming it, it must appear that there were both an occasion and a duty to speak, and, in addition to this, that the omission to speak upon opportunity being presented was intentional or in negligent disregard of the plain dictates of conscience and justice." A. & E. Ency., 2nd Ed., Vol. 11, p. 432.

And he will not be estopped by his silence, though he may know or be informed that others are negotiating for rights and interests in property bound by his title of record, as he is under no obligation to warn or apprise them of that which the record discloses. *Porter* v. *Wheeler,* 105 Ala. 451; *Knouff* v. *Thompson,* 16 Pa. St. 357; *Sulphine* v. *Dunbar,* 55 Miss. 255; *Bales* v. *Perry,* 51 Mo. 449, l. c. 453; *Frazee* v. *Frazee,* 79 Md. 27; *Rice* v. *Dewey,* 54 Barb. 455; *Brinckerhoff* v. *Lansing,* 4 Johns. Ch. 64.

Bramble v. *Kingsberry,* 39 Ark. 131, holds that knowledge by an owner of land that one is about to buy it from another does not impose upon the owner the duty to seek out that one and advise him not to buy.

In *Sullivan* v. *Davis,* 29 Kan. 28, the Court, in an opinion by Brewer, J., hold that a land owner is not estopped, by knowing that a lithographed map showing a subdivision of his land into lots and blocks is in circulation, to deny the validity of such subdivison.

In *Knouff* v. *Thompson,* 16 Pa. St. 357, l. c. 364, it is said by Chancellor Kent:

"The party who has placed his written title on record has given the notice which every person is bound to know and respect. The law does not require him to go further. But if he speaks or acts, it must be consistent with his legal title. The law distinguishes between silence and encouragement."

In *Davis* v. *Davis,* 26 Cal. 23, it is said:

"The doctrine of estoppel in pais should not be too readily extended when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute which

makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statute was to render estates secure. In *Parker* v. *Barker*, 2 Metcf. 423, the Supreme Court of Massachusetts held that a parol stipulation made by one party and acted on by the other, will not constitute an estoppel with reference to land, unless it be attended by actual fraud or concealment."

In *Alexander* v. *Kerr*, 2 Rawle, 90, Gibson, C. J., discussing the effect of recorded muniments of title, says:

"While courts of justice have, on the one hand, endeavored to repress dishonesty, they have, on the other, exacted the utmost vigilance and caution. It is difficult to imagine how the concealment of a fact which an individual of common prudence and sagacity can discover, can constitute a fraud."

In *Thompson* v. *Simpson*, 128 N. Y. 270, l. c. 289, 291, it is said for the court by Andrews, J:

"An estoppel may arise from silence as well as words. But it is only when there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and knowing the circumstances requiring him to speak, keeps silent. * * * The owner of property which another has assumed to convey without authority, is not precluded by mere silence from subsequently claiming it. There must in addition have been both an occasion and a duty to speak, and it must appear that the omission to speak, upon opportunity being presented, was intentional or in negligent disregard of the plain dictates of conscience and justice. * * * The mere fact that another may act to his prejudice if the true state of things is not disclosed does not render silence culpable, and mere inaction in such a case is not sufficient. (*Bigelow on Estoppel*, 595.) The true owner owes no duty of active diligence to protect the other party from injury. * * *

"The security of legal titles to real property and the uniform policy of the law require that the doctrine of equitable estoppel, where invoked to bar the assertion to the legal title to land, should be cautiously applied, and only when grounds for the application are clearly and satisfactorily established." *Trenton Banking Co.* v. *Duncan*, 86 N. Y. 221.

Dameron v. *Jamison*, 143 Mo. 483. Ejectment. Defendant was in possession of the land. He had taken possession of it under a tax deed and had made valuable improvements upon the land and paid the taxes thereon in ignorance of any claim of the plaintiffs; but the plaintiffs had knowledge of all these acts of defendants as they occurred. Plaintiffs permitted the expenditure by standing

by in a state of silence and inaction, and did not inform the defendant of their claim or right to the land. The tax deed was held void and the facts recited were held to constitute no defense. The Court say:

"It is then stated (in the pleading), that defendant was induced to make such improvements under the *belief that his title was good* and that plaintiffs did not claim any interest in the land, and that his *belief* was induced by their acts, conduct and statements. No statements upon which this belief was based are set out. There is nothing pleaded to indicate that anything was said by plaintiffs that authorized or warranted any such belief. No misrepresentations are charged. The acts and conduct relied upon in this part of the answer are evidently the failure to notify defendant of plaintiffs' title. This was of record. It was as much the duty of defendant as of plaintiffs to know whether the tax proceedings under which he claimed were regular and valid. They were under no obligation to inform him upon that subject. Silence upon plaintiffs' part was no breach of duty and will not estop them from asserting their title. 'If a man holds title to his lands by deed which has been duly recorded, it is all the notice he is bound to give so long as he remains passive.' *Bales* v. *Perry*, 51 Mo. 449; *Kingman* v. *Graham*, 51 Wis. 232; *Mayo* v. *Cartwright*, 30 Ark. 407; *Throckmorton* v. *Pence*, 121 Mo. 50."

IV.

Were the plaintiffs justified in relying on the statements of the prospectus as establishing as against the world that the title to the mines was vested in the Gold Company?

(a) In *Banque* v. *Brown*, 34 Fed. 196, Wallace, J., states what is common knowledge in regard to a prospectus, in this language:

"It is utterly improbable that men of the acuteness and experience of the complainants were induced to put millions of dollars of money in a speculation by the confidence reposed in any prospectus. None would have appreciated better than they the unreliability of such a statement or understood better the inaccuracies and exaggerations which generally characterize such advertise-

ments. * * * No purchaser of bonds was justified in assuming that the company intended to tie itself, which under the exigencies of the enterprise might become unjudicious or impracticable or in attributing such a meaning to the recitals as they would bear if contained in a contract."

There were persuasive inducements offered in the prospectus to purchasers of stock, namely: the guaranteed agreement to pay for five years a 15 per cent annual dividend; the offer to redeem in two years; the deposit of stocks and bonds dealt in on the New York and London stock exchange as security to make the dividend agreement good. But the question is whether or not the intending stock subscriber was justified as against the world in relying upon the representations in the prospectus as to the title being vested in the corporation? If the subscriber has faith in the resources and money making capacity of the corporation in which he subscribes, or in his express contract with that corporation which induces his subscription to the stock, that is one thing; his rights growing out of a reliance upon representations as to the character of the title to real estate claimed by the corporation, is another.

The rules of the trade applicable to persons purchasing an interest in mines is stated in MacSwinney's Law of Mines (p. 187) in this language:

"A purchaser of a mine, or any share or interest therein, which includes a share or interest in the land itself, is entitled to a regular abstract of title. A purchaser of a share in a mining concern which does not include any interest in the land itself is not entitled to an abstract, but only to such evidence of the constitution of the concern and of the nature of the title under which the land is worked as will show that the subject matter of the purchase is what it professes to be and that the proposed transfer will give him a valid title to the share." *Curling* v. *Flight*, 2 Ph. Ch. R. 613.

"Where a third person is in possession of or working mines or quarries, knowledge of the title under which such possession is held will be imputed to the purchaser of the land containing said mines or quarries." *MacSwinney's Law of Mines*, p. 189. *Holmes* v. *Powell*, 18 DeG. M. & G. 572.

The possession of a licensee is the possession of the owning licensor.

Legal possession is peculiarly forceful in determining the right of property in mines. *United States R. S.*, Sec. 910.

Lawler and Wells held the legal possession of the mines during the whole period under review; and there is no reason suggested anywhere in the record to doubt that an inquiry of any one in the occupancy of the mines would have disclosed the fact of that possession. Persons dealing with mining properties will be held to know and act with respect to all general laws and customs appertaining to such properties.

(b) If the purchaser is intending to rely upon the loose expressions of a prospectus it becomes his duty to read every word of it, and to give those words their usually accepted meaning.

Bigelow on Estoppel, page 562, states the rule thus:

"The whole representation must be taken together. One part, although sufficient alone to create an estoppel, cannot be separated from another part connected with it which takes away its effect though only by making the other part uncertain."

The representation to justify a prudent man in acting upon it must be plain, not doubtful, or matter of questionable inference. *Tillotson v. Mitchell,* 111 Ill. 518; *Blodgett v. Perry,* 97 Mo. 263; *Bennett* v. *Dean,* 41 Mich. 472; *Keating* v. *Orn,* 77 Pa. St. 89.

It must have reference to a present or past state of things.

Bigelow on Estoppel, p. 555; *Jackson* v. *Allen,* 120 Mass. 64, l. c. 79; *Burgess* v. *Seligman,* 107 U. S. 20; *Starry* v. *Korab,* 65 Ia. 267. Presumptions favor defendants. *Southern D. Co. v. Silva,* 128 U. S. 249.

The prospectus was issued under date of September 24th, 1892. (Finding 14.) It recited: "Objects.—This company is formed *to acquire* without further expense or liability to subscribers on October 1st, 1892, as a going concern *and to provide* a working capital of $200,000 to further equip and develop the Seven Stars," etc. (Printed Record p. 20.)

This is clearly a reference to an expectation and a statement with reference to an event to occur in the future; and inferentially involves the truth that the company at the time of the issuance of the prospectus had no title to the mines. In connection with the statement just quoted, what effect is to be given to the words "this company presents an unusual opportunity for investors to acquire an interest in one of the richest and most extensive gold mines of the world in which are not only dividends payable quarterly in gold of fifteen per cent. per annum, but on stock allotted on this subscription guaranteed for five years should they become dissatisfied with their investment as stated." (Printed Record p. 19.)

Persons who are so simple as to believe that when they buy stock in a mining corporation they acquire an interest and title in

real property, although that property may be owned by the corporation, have no business in mixing up with such complicated financial transactions as the investment in mining property involves. Such a statement cannot, by any reasonably prudent and experienced person, be construed as an unambiguous representation that the mining company owns a fee simple title to the mine it is engaged in exploiting. Any reasonably prudent person, when investing in the stock of a mining corporation then being formed to acquire a property, must contemplate and be presumed to know that valuable mines with fully equipped mills and constituting a then going concern, which had within a short period produced and sold ore of a value exceeding $178,000, were not to be acquired as a gratuity, and that the enterprise could not be a success until the capital stock, to some substantial extent at least, was paid up and in the treasury. If one-sixth of the capital stock of the Seven Stars Gold Mining Company had been paid in, the controversy now before the Court would never have occurred.

(c) The small words on the map "belonging to," construed with the language of the prospectus above referred to, do not make the statement as to the title to the mine unambiguous, or such that a reasonably careful and prudent man would rely upon them as evidence of title. The words "belonging to" mean about the same as "the property of," and these terms when applied to real estate are of a vague and indefinite significance.

One who has agreed to buy real estate and taken a bond for a deed, the deed to be executed upon the payment of the purchase price, speaks of himself as the owner, and of the property as belonging to him. One who, under an agreement to purchase, has land conveyed to him and gives back a deed of trust to secure the payment of the entire purchase price, so that his real interest in the land is nominal, the title subject to a condition, speaks of the property as belonging to him, and the land is referred to in common parlance as his property. In ordinary uses those terms have no significance in determining the extent of interest or character of title held by the so-called property owner.

The word *owner* is said, in *Gitchell* v. *Cridley,* 84 Mo. 476, to have "no precise legal significance."

And in *People* v. *Cady,* 105 N. Y. 299, it is said, in construing a statute relative to the collection of a tax, that the words "belonging to the same owner" "do not mean simply the technical owner of the title as therein used, but they mean the person in whose name as owner or occupant the lots are assessed."

(d) Did the plaintiffs, as reasonable men, presume, upon receiving a copy of this prospectus of the mining corporation from the office of the corporation in New York City and upon reading the representations contained in it as to the ownership of the mine, that, in case those representations were not true the real owners of the mine, whoever and wherever they were, (who, in fact, resided on the opposite side of the continent), would know of that representation and would seek out the plaintiffs and warn them that they, Lawler and Wells, held the legal title to the mines and had legal possession of them, and had done nothing more than to enter into a contract to deliver a deed to the mines when the stipulated price had been paid?

Such a presumption could not have been indulged in:

Because no reasonable person would assume that this declaration would reach the owner of the mines if the statement contained therein were untrue:

Because it is not customary or usual in America for persons who hold a legal title to property with muniments of title duly recorded, of which the world has notice, to proclaim by newspaper publication, hand bills, or telegraphic dispatches that they are the owners:

Because of the inherent difficulties of bringing the matter to the notice of persons liable to be affected by such misrepresentations before the damage had been done. In other words because of the futility and expense of such attempts.

If the plaintiffs, as reasonable people, did not presume that in case the representations in the prospectus were untrue, Lawler and Wells would have broken the silence, would have shaken off their inactivity and denied those representations, and that such a denial would have been brought home to them, the plaintiffs, then it cannot be said that that silence and that inactivity *induced* or *was a material inducement* for the plaintiffs to purchase the stock. Indeed the record seems to have eliminated this element of inducement from the case, and if so, then as a consequence, the case from the courts. The court found as a fact:

"That the subscribers to the capital stock of the Seven Stars Gold Mining Company, in making their several subscriptions therefor and payments thereon, did so without any knowledge of and *without relying on* anything said or done, or omitted to be said or done in the premises, by the said Lawler and Wells or either of them." (Finding 44.)

And they further found:

"That John Lawler and Ed. W. Wells did not, before or at the time of any subscriptions to the capital stock of the Seven Stars

Gold Mining Company or payment on account of said subscriptions, make any representations to or communicate with any subscriber of said stock concerning any matter or anything in issue herein." (Finding 45.)

V.

The decisions of courts recognizing, defining and enforcing the principles of equitable estoppel are so numerous as to seem to have considered and applied them to an infinite variety of facts and circumstances; but the diligence of counsel on both sides of this controversy has not been rewarded with the precedent of the case at bar.

While silence and inaction under certain conditions, and in respect to certain relations existing between the parties affected, have been recognized as a sufficient basis for the enforcement of the salutory principle of equitable estoppel, it is submitted that every worthy precedent upon this subject can be harmonized, by this rule:

The silence and inaction which create an estoppel occur under such circumstances and are committed by a person sustaining such a relation to the other that the person seeking to enforce the estoppel would reasonably presume such silence and inaction to be a positive representation on the part of the other of the truth of the fact of which the contrary is sought to be asserted.

Mr. Pomeroy, in his work on Equity Jurisprudence (Sec. 805), says:

"The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon."

Speaking more particularly of estoppel as applied to interests in lands, he says (Sec. 807):

"This equity, being merely an instance of fraud, requires intentional deceit, or at least that gross negligence which is evidence of an intent to deceive. In the language of a most worthy decision, to preclude the owner of land from asserting his title or interest under such circumstances, 'there must be shown, either actual fraud

or the fault of negligence, equivalent to fraud on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak, or such actual intervention on his part as in *Storrs* v. *Barker,* so as to render it just that as between himself and the party acting upon his suggestion, he should bear the loss.' What is the result of this rule? It is accurately explained in the same decision. While the owner of the land may, by his acts in pais, preclude himself from asserting his legal title, it is obvious that the doctrine should be carefully and sparingly applied and only on the doctrine of clear and satisfactory grounds of justice and equity. It is opposed to the whole of the statute on frauds and it would greatly tend to the insecurity of titles if they were allowed to be effected by parol evidence of right of doubtful character." *Brant* v. *Virginia C. & I. Co.,* 93 U. S. 326.

In *Bloomfield* v. *Charter Oak Nat. Bank,* 121 U. S. 121, opinion by Mr. Justice Gray, it is said:

"And no estoppel in pais can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon. *Burgess* v. *Seligman,* 107 U. S. 20; *Scovill* v. *Thayer,* 105 U. S. 143; *Brant* v. *Virginia C. & I. Co.,* 93 U. S. 326."

The omission of Lawler and Wells to publicly proclaim their title to the mines under all the facts disclosed by the record was not inconsistent with good faith, fair dealing and high character. Such conduct removes all the foundations from which the principles of equitable estoppel may be applied.

"Estoppel in pais may be defined as a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." *Bigelow on Estoppel,* 4th Ed. p. 445; *Gray* v. *Gray,* 83 Mo. 106; *Yates* v. *Hurd,* 8 Colo. 343.

Speaking further on the subject of estoppel from conduct, misconduct or misrepresentations, the learned author says, p. 543;

"In its most common phase this estoppel is founded upon deceit and has its justification in the duty of courts to prevent the accomplishment of fraud. The estoppel in question consists in holding for truth a representation acted upon when the person who made it, or his privies seek to deny its truth and deprive the party who has acted upon it of the benefit obtained."

In *Delaplaine* v. *Hitchcock,* 6 Hill 14, it is said:

"The mouth of a party will sometimes be closed after he has omitted to speak at the proper time, and thus has been the occasion of misleading a third person. * * * An estoppel in

pais is a moral question. It can only exist where a party is attempting to do that which casuists would decide to be a wrong: something which is against good conscience and honest dealing."

In *Sulphine* v. *Dunbar,* 55 Miss. 255, l. c. 260, Campbell J. for the court in discussing the obligation of a person having an interest in land to speak out when she knew other persons were negotiating for the purchase of the land, declared:

"*She had a right to be silent.* Her title to an interest in the land was indisputable, and the world had notice of it."

Herman on Estoppel in Sec. 948, says: "It is only when silence becomes a fraud that it postpones. The element of fraud is essential, either in the intention of the party estopped or in the fact of the evidence which he attempts to set up. The primary ground of this estoppel is, that it would be a fraud in the party to assert what his previous conduct had denied, when on the faith of that denial others have acted."

In *Commonwealth* v. *Moltz,* 10 Pa. 527, the court say:

"He who avers an estoppel, either by pleading or evidence, must establish by proof, positive or circumstantial, every fact that essentially enters into the character of such a reply to the plaintiffs' suit. It is to be considered that the doctrine of estoppel is an exception to the general rule for the prevention of fraud and is not to be extended beyond the reasons on which it is founded. 1 *Green* 1, *Ev.,* Sec. 204." * * * "It is now established that in all cases where an act is done or a statement made by a party, the truth or efficacy of which *would be a fraud* on his part to controvert or impair, the character of an estoppel shall be of what would otherwise be mere matter of evidence. * * * It is the presence of fraud, either in the intention of the party or the effect which would be worked, by permitting him a negation that distinguishes this species of estoppel from what was so considered by the old common law. But it is obvious there can be no such fraud where the purchaser, or other actor was or ought to have been acquainted with the subject of his action or even had the means of knowledge and neglected to avail himself of them."

It is said in *Brewer* v. *Railroad,* 5 Metcf. 479:

"A party is not to be estopped to prove a legal title to his estate by misrepresentation of its locality made by a mistake without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective; for he may require a warranty, and it would be most unjust that a party should forfeit his estate by a mere mistake."

In the celebrated case of *Biddle Boggs* v. *Merced M. Co.*, 14 Cal. 279, in the opinion by Chief Justice Field it is said:

"The only matters alleged in the answer by way of estoppel are the private survey of Fremont in 1849, and his presentation of the same to the Board of Commissioners, as embracing and identifying the tract he claimed, and subsequent public and repeated disclaimers by him at the time the defendant took possession of the premises in controversy in 1851, and, afterwards, up to July, 1855, of any title or claim to the property, and of any title or claim to any land within the exterior bounds of the grant to Alvarado, except that designated in his survey.

"Upon these declarations, the answer avers the defendant acted and was induced to make valuable and permanent improvements upon the premises in controversy and adjacent property, at an expenditure of upwards of eight hundred thousand dollars, and insists that the plaintiff is thereby estopped from asserting any title under Fremont. Other matters are, also, urged by way of estoppel, not alleged in the answer, and which, but for the stipulation of the parties, would not be considered by the Court. In the affidavits for a continuance, to which we have already referred, it was stated that the defendant expected, by several witnesses named, to prove that from the time possession was taken of the premises, to that date, Fremont knew of the claim of the defendant to the property, and its occupation and improvement, and never set up any title to the same until July, 1855, or forbid the occupation and improvement. To prevent the continuance it was admitted that the witnesses, if present, would testify as stated, and that their testimony should be deemed as actually given, or as offered and overruled as improper.

"The Court passed upon these matters, and found that up to July, 1855, Fremont claimed the premises in his survey, and made the representation and disclaimers alleged to the property in controversy, but that it was not shown that he wilfully made them, or intended to deceive or defraud the defendant, or to influence its conduct, but that they were made 'without any fraudulent intent and before the final location of his claim, and when it was unknown where the lines thereof would be fixed,' and that he knew of the occupation and improvement of the defendant from the time possession was taken, without forbidding the same, or claiming the premises, until July, 1855.

"It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which influences the conduct of another to his injury. The party is said, in such cases, to

be estopped from denying the truth of his admissions. But to the application of this principle, with respect to the title of property, it must appear, first that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

"These qualifications in the application of the doctrine will be found fully sustained by the authorities. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title and the effect of the estoppel being to forfeit his property and transfer its enjoyment to another. 'In all this class of cases,' says Story, speaking of equitable estoppels, 'the doctrine proceeds upon the ground of constructive fraud, or of gross negligence which, in effect, implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has, accordingly, been laid down by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence, so gross as to amount to constructive fraud.' (1 Story's Eq. Sec. 391.)

" 'In order to the introduction of this equity,' says Adams in his treatise on the doctrine of equity, 'it is essential that there be intentional deceit in the defendant, or, at all events, that degree of gross negligence, which amounts to evidence of an intent to deceive.' "

In concluding this branch of the subject the learned judge says:

"To give the declarations and disclaimers made under these circumstances the effect of an estoppel, operating as it would to deprive Fremont of his estate in the premises, a transfer of it to the defendant would be in the highest degree unequitable and unjust. There is no proof of any intention to deceive nor of any facts from which such an intention can be justly inferred."

A case somewhat similar in its controlling facts to the one last cited, is *Henshaw* v. *Bissell,* 85 U. S. 255. Mr. Justice Field, discussing the doctrine of equitable estoppel says: "For its application there must be some intended deception in the conduct or

declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud.

"An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting its legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury."

Morgan v. *Chicago, etc., R. Co.*, 96 U. S. 716, opinion by Mr. Justice Swayne.

Morgan, the appellant, had been engineer on the railroad, the predecessor of appellee, when the road was located, and it became his duty to act for the road in obtaining the right of way. He, with Spencer, another engineer, who was clothed with the same duty, owned the land in controversy and made a town plat on which the land in question was marked "depot." The company made a map from the data supplied by Morgan and with his knowledge, in which this land was marked "depot ground," and it was subsequently improved by the railroad company as such.

Spencer testified that he supposed the making of the town plat vested a sufficient title in the company. He added, "Had I not thought so it would have been my duty, as engineer of that division, to have seen that the company had a proper deed." He said further that Morgan occupied the same relation to the company as himself and was clothed with the same duty. Another partner in the land testified that, "Looking at the interests of the parties as affected by the location of the depot I have always supposed that good faith on our part demanded that these strips should belong to the railroad." Morgan himself testified, "I set them (the lands in controversy) apart with a view to the ultimate needs of the railroad company at this station."

To these facts the following language of the learned judge is strikingly appropriate:

"The appellee insists that the record discloses a case of estoppel in pais, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *Bank* v. *Lee*, 13 Pet., 107.

"He is not permitted to deny a state of things, which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly upon that belief. The

doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants Bank* v. *State Bank,* 10 Wall. 604. * * *

"It is incredible that the depot would have been put there if any doubt had been entertained as to the ownership by the company of property so vital to its beneficial use. It would also have been a gross fraud on the part of the appellant, who was then in the service of the company as an engineer, to stand by in silence and see it erected under such circumstances."

The opinion in *Leather Mfgrs. Bank* v. *Morgan,* 117 U. S. 108, was delivered by Mr. Justice Harlan and contains a lucid dicussion of the relationship between a depositor and his bank and their mutual obligations relative to the inquiry, whether a depositor is estopped by his negligence in failing to examine his account and pass book when balanced by the bank and returned to him, when such an examination would have discovered forged checks which had been charged to his account during a period covering about six months. It was held by the court to be obligatory upon the depositor to make such examination. In the opinion it is said:

"The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book. * * *

"Without impugning the general rule that an account rendered which has become an account stated, is open to correction for mistake or fraud, (*Perkins* v. *Hart,* 11 Wheat. 237; *Wiggins* v. *Burkham,* 10 Wall, 129), other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made, in good faith, by another for him; by reason of which negligence, the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken if such notice had been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness. * * *

"The general doctrine, with proper limitations, was well expressed in *Freeman* v. *Cooke,* 2 Exch. 654, and in *Carr* v. *London & N. W. Ry. Co.,* L. R. 10 C. P. 307. In the first of those cases

it was said by Parke, B., for the whole court, that, 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." And in the other case, Brett, J., speaking for the court, said: "If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist, * * *

"These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that, where a duty is cast upon a person, by the usages of business, or otherwise, to disclose the truth,—which he has the means, by ordinary diligence, of ascertaining,—and he neglects or omits to discharge that duty whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled to question the construction rationally placed by the latter upon his conduct. * * *

"The principle stated by Lord Campbell in *Cairncross* v. *Lorimer*, 3 Macq. 827, 830, that 'if a party has an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have if it had been done by his previous license.' This, however, could not be if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance, and notify it of errors therein in order that it might correct them, and, if necessary, take steps for its protection by compelling restitution by the forger."

In *Brant* v. *Virginia Coal & I. Co.*, 93 U. S. 326, Mr. Justice Field, for the court, said:

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on

his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' (1 Story Eq., 391.) To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania, that, 'the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.' *Hill* v. *Epley*, 31 Pa. St. 334; *Henshaw* v. *Bissell*, 18 Wall. 271; *Biddle Boggs* v. *Mining Co.*, 14 Cal. 368; *Davis* v. *Davis*, 26 Cal. 23; *Com.* v. *Moltz*, 10 Pa. 531; *Copeland* v. *Copeland*, 28 Me. 539; *Delaplaine* v. *Hitchcock*, 6 Hill. 616; *Havis* v. *Marchant*, 1 Curt. C. C., 136; *Zuchtmann* v. *Robert*, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established."

It is unnecessary to consider in any aspect of this case the claims of the plaintiff, Clinton B. Wiser, who seems to be the bell wether and the inspiration of this suit, and the largest stock subscriber, whose subscriptions began with October 13th, 1892, and continued at intervals until March 27th, 1893, and aggregated a total subscription of $7,851.40; for "the plaintiff, Clinton B. Wiser, was a director of the Seven Stars Gold Mining Company and his name appeared on the prospectus as such director, and he assisted in the circulation of the American prospectus and in the sale of the stock of that corporation, and during all that time he had knowledge and notice that the title to the property in controversy was not vested in the Seven Stars Gold Mining Company." **(Finding 39.)**

But we submit that a consideration of all the facts presented by this record will impress the mind with the conviction that none of the other complainants were any more induced by the silence or inaction or other uncommunicated conduct of Lawler and Wells to invest in the mining stock to their hurt than was their co-complainant, Clinton B. Wiser.

VI.

The fact that "on May 20th, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of the stock of the Seven Stars Gold Mining Company" (Finding 26), is not effective as a ground of estoppel against him or Wells. There is no finding of fact to the effect that a single share of the stock was subscribed or paid for after the 20th day of May, 1893. Nor is there any finding of fact to the effect that any money realized from the sale of the shares of stock in question were paid to or received by either Lawler or Wells or the bank for them after that date. The only payments received by them, other than that realized from ores taken from the Hillside group of mines after May 20th, 1893, were received on the following dates: On June 3d, 1893, $4,500; June 5th, 1893, $2,200; August 4th, 1893, $4,500. These sums came from the Industrial Mining and Guaranty Company. And while the record does not show that the company obtained any money from stock subscriptions after May 15th, 1893 (and such a showing must be made to raise a debatable question in this respect), it is found by the court that $43,700 was obtained by that company from loans subsequent to May 11th, 1903. (Finding 49). If this finding of fact is not sufficient to expressly indicate that the $11,200 comprised of the three items last mentioned was derived from those loans, it is at least sufficient to raise a presumption of fact that such was the source of that fund, and that it did not come from the money collected by the company from the sales of stock to plaintiffs or any other stockholder.

VII.

The facts established by this record are not such that equity will impress the moneys paid to Lawler and Wells under the Cowland contract with the character of a trust fund for the benefit of plaintiffs.

In the absence of any finding that Lawler and Wells knew of any fraud committed by either of the promoting corporations upon the rights of the plaintiffs, or of gross negligence or misconduct on their part equivalent in its scope and effect to fraud upon their rights, an essential requisite to the invocation of the doctrine of constructive trusts is wanting, viz.: the lack of an independent, dominant right to the moneys so acquired by an innocent holder, without knowledge, for value.

The prospectus, upon the faith of which plaintiffs claim to have invested in the stock of the Seven Stars Gold Mining Company, recited that "subscriptions will be received by the Industrial Mining and Guaranty Company, 41 Broadway, New York," (Printed Record, p. 19); that "dividends will be paid in gold quarterly from the date of allotment at the office of the Industrial Mining and Guaranty Company, No. 41 Broadway, New York, U. S. A.;" that, "Information.—Prospectuses, maps, reports and other information may be obtained from the Industrial Mining and Guaranty Company, 41 Broadway, New York," (Printed Record, p. 25); and "this form (of application) to be sent with the deposit to the Industrial Mining and Guaranty Company, 41 Broadway, New York, or any of the bankers," etc. (Printed Record, p. 28). And the fact is established in the findings of the court "that as to stock sold under the American prospectus to American stock purchasers, every contract of sale and purchase of stock of the Seven Stars Gold Mining Company was conducted by the Industrial Mining and Guaranty Company of the one part, as sellers, and by the individual subscriber to said stock, as the purchaser, on the other part; * * * and that neither John Lawler nor Ed. W. Wells was present at, nor a party to, any of said contracts." (Finding 41.)

It is beyond dispute, therefore, that the plaintiffs knew of the general agency of the Industrial Mining and Guaranty Company, and that they contracted with and paid their subscriptions to that company as the agent of the Seven Stars Gold Mining Company. This agent deposited all of the money received from the plaintiffs, with that paid in by all of the American and English subscribers to the stock of this company, together with all moneys received by it on account of its various enterprises, as a common

fund in an ordinary deposit on account in its name in the Continental Bank of New York, and checked against, disbursed and used that common fund in the course of its business. (Findings 49 and 54).

It paid from this common fund on account of operating expenses of the Hillside mines the sum of $21,004.50 prior to September 28th, 1892, when up to that time it had received from the sale of the Seven Star stock but $2,100, (Finding 55); and from this fund it paid out for operating expenses, purchase of machinery, dividends to the stockholders of the Seven Stars Company and other expenses connected with this enterprise the aggregate sum of $380,295.81, which amounted to $248,436.29 more than it received from all the American subscribers to this stock, including plaintiffs, and $127,986.84 more than the amount of money received by it from the sale of this stock, both in England and America. (Findings 57 and 54.) And the Industrial Mining and Guaranty Company distributed from that general fund during the period involved in this transaction on account of its various enterprises the full sum of $824,142.13. (Finding 49.)

We submit that when this record discloses that the plaintiffs from time to time paid their stock subscriptions to the agent of the Seven Stars Gold Mining Company, and that agent in the usual course of its business turned the funds so received into its general assets and thereupon disbursed from its general assets more than the total amount of the American stock subscriptions for and on account of the Seven Stars Gold Mining Company for purposes other than payments to Lawler and Wells under the Cowland contract, it is not a fact, nor can it be inferred, implied or construed from the facts established by this record that any money of the plaintiffs came into the hands of Lawler and Wells as a payment under the Cowland contract. And no such fact is found by the territorial court.

The Industrial Mining and Guaranty Company received from the sale of guaranteed stock to both American and English subscribers the net sum of $252,308.97, and from subscribers to the common stock $2,583.80, making a total receipt from all subscriptions to the stock of the Seven Stars Gold Mining Company of $254,892.77. (Finding 54). It expended subsequent to June 15th, 1892, for the benefit of the Seven Stars Gold Mining Company, or its stockholders, for operating expenses, purchasing machinery, payment on account of the price of the Hillside group of mines, dividends and other expenses connected with the enterprise the aggregate sum of $380,295.81, (Finding 57); and prior to June 15th, 1892, for the same purposes $12,528.87,

(Finding 59); making a total outlay by it in this enterprise for the benefit of the Seven Stars Gold Mining Company, or its stockholders, of $392,824.68. That is to say, it expended upon this enterprise $137,931.91 more than the stockholders of the Seven Stars Gold Mining Company paid into the enterprise.

Now, under this state of facts, who can say whether the $112,339.96 paid by the Industrial Mining & Guaranty Company to Lawler and Wells came from or were the moneys or property paid in by the stock subscribers, or were the moneys or property of the Industrial Mining & Guaranty Company. Much of this large expenditure for machinery and excavations may have been and doubtless was imprudently made, for there is no finding that the mining property as a whole was of any greater value after than before its contact with these speculative companies.

Upon these facts we may adopt the broad language of Lord Ellenborough in *Taylor v. Plumer,* 3 Mau. & Sel. 526, to the effect that "the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail," without his qualification that such "is the case when the subject is turned into money and mixed and confounded in a general mass of the same description," and yet there is no place for the doctrine of implied or constructive trusts in this case.

All the payments made to Lawler and Wells under the Cowland contract—and they received no money in connection with this enterprise except such as the court has found was paid to them "on account of the purchase price of said property under the terms of the original escrow agreement" and amendments (Findings 47 and 48)—were received by them for a valuable consideration, to-wit, the consideration of making the original escrow agreement and the extensions thereof. And that agreement and the extensions having been made innocently and in good faith, the receipt of money under its terms imposed no obligation upon them to investigate or inquire where the moneys came from; nor will the receipt of such payments by them under the circumstances disclosed impress them with constructive notice of the sources from which the funds came to make the payments. Moneys received for a valuable consideration in good faith and without notice of equites from a common fund in the hands of an agent with whom they had been placed by the claimants, though in the hands of the agent they were subject to be impressed with a trust, are when so disbursed, absolved from that liability. Perry on Trust Vol. 1 Sec. 218.

VIII.

Plaintiffs have no natural equities in the improvements or machinery placed upon the lands, for the reason that all such machinery and improvements were paid for by and from the funds of the Industrial and Mining Guaranty Company. (Finding 57.) When the improvements were made, the Industrial Company knew the title of the mines was vested in Lawler and Wells. *Steel* v. *St. Louis Smelting, etc., Co.*, 106 U. S. 432.

CONCLUSION.

The effect of granting the relief sought by complainants is that a court of chancery shall, by its decree, take from the real owners, whose title is proclaimed by public records, a mining property confessedly worth $450,000, and vest the same in a corporation for the use of its stockholders, excluding its creditors, after that corporation has made a fair contract to buy the mining property from its real owners for $450,000, when neither the corporation nor the stockholders nor any other person had paid more than the sum of $231,139.82 on the purchase price, and when all the stockholders of the corporation together had never put into the capital stock or assets of the corporation more than $254,892.77.

When the judiciary shall have by searching found out and uncovered principles of equity and righteousness to the eager desire of an aspiring Christian civilization by which such a termination is gendered from the coition of such facts, they will have discovered a better receipt for getting something for nothing than that of the Louisiana Lottery.

In *Chilton* v. *Braiden's Admr.* 67 U. S. 458, it is said: "When one has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying consideration." But before the bar the suggestion is that plaintiffs take from the defendants their property without paying for it. *Slide, etc., Mines* v. *Seymour*, 153 U. S. 509.

We respectfully submit that under the pleadings and upon the facts found and certified by the Supreme Court of the Territory of Arizona no remediable equities exist in favor of the appellants and that the decree of the Supreme Court of the Territory should be affirmed.

H. C. McDOUGAL,
W. C. SCARRITT,
Counsel for Lawler and Wells.

E. L. SCARRITT,
Of Counsel.

APPENDIX.

In the Supreme Court of the Territory of Arizona,
January Term, 1900.

Clinton B. Wiser, C. M. Field, John Kerr, James A. Ferguson, Dorsey Neville, Mary M. Heath, John J. Miller, Henry L. Mugsford, William F. Foster, Edgar G. Miller, L. F. Hiorne, Sidney G. Law, Edward M. Smith, Harper M. Smith, Benjamin Goodman, Lester M. Crouch, John B. Clute, Katie T. Courtney, H. S. Anders, and Cecil Quentin, Appellants,

vs.

John Lawler, Ed. W. Wells, Seven Stars Gold Mining Company, Industrial Mining and Guaranty Company, and John Griffin, Receiver, Appellees.

Appeal from the District Court of Yavapai County, Hon. Webster Street, Judge.

FINDINGS OF FACT.

The supreme court of the Territory of Arizona do hereby, in the above-entitled proceeding, find the following facts:

1. That on the 12th day of May, 1892, ever since and now, the defendants, John Lawler and Ed. W. Wells, were and are the owners of the legal title to the mines and mining claims located in the Eureka mining district in Yavapai county, Arizona, known as "Hillside," "Happy Jack," "Contact No. 1," "Contact No. 2" and "Camp;" and locations known as "Midnight," "Morning Glory," "Water," "Hidden Treasure," "Sucker," "Side," "Purple Rose," "Southern Belle," "Robert E. Lee," "Lucky Cuss," "Centipede" and "Good Enough," which are hereby denominated and will be hereinafter referred to as the "Hillside group of mines." The muniments showing such title in Lawler and Wells were then, and ever since have been and are now of record in the office of the county recorder of Yavapai county, Territory of Arizona, where said mines are situate; that John Lawler and Ed. W. Wells were and are cotenants in said group of mines, the said Lawler owning an undivided three-fourth interest therein and the said Wells owning an undivided one-fourth interest therein.

2. That prior to May 12th, 1892, the defendants, John Lawler and Ed. W. Wells, offered said mines for sale at the purchase price of four hundred and fifty thousand dollars ($450,000) cash.

3. That a few days prior to May 12th, 1892, H. H. Warner visited this group of mines with T. A. Rickard, a mining expert, and examined the same. After such examination he contracted for the purchase of said group from Lawler and Wells for the sum of $450,000, paying $20,000 in cash, the remainder payable in installments, in accordance with the terms of an escrow agreement entered into on May 12th, 1892, by and between John Lawler and Ed. W. Wells on the one part and Charles Cowland on the other part, which provided, among other things, that "the deed conveying the mine to Cowland be annexed to said agreement and shall be held in escrow with the Bank of Arizona, at Prescott, Arizona, to be held and delivered by the bank upon the following conditions only: The bank to deliver the deed to Cowland, his heirs or assigns, upon his or their paying or causing to be paid, as herein provided for, the full sum of $450,000. In case of failure of said Cowland in making or causing to be made any of said payments of money at the time or times and in the manner herein stated, then the said Bank of Arizona, upon demand being made thereupon by said Lawler and Wells, shall deliver said deed to Lawler and Wells, or their representatives, and in the event of such failure of said Cowland to make or cause to be made any of the said payments, then all payments of money theretofore made by said Cowland on the purchase price of said property shall be forfeited by him; and he agrees and covenants with said Lawler and Wells that all money paid by him as purchase-money on said property shall belong to them and be retained by them as liquidated damages accruing to them for the failure of said Cowland to purchase, take and pay for said property as hereinabove stated and stipulated, and the said Lawler and Wells shall be at once released and discharged from any further duty or obligation to sell and covey the property. It is further agreed that said Cowland, by himself and his agents, may at once enter into and upon said property, and take possession thereof, subject, however, to the legal possession of said Lawler and Wells; and the said Cowland may use, possess, explore, develop, work and operate the said property, and all the proceeds derived from such use, development, operation and working of the same and from the ores taken therefrom shall be at once paid to Lawler and Wells, and be applied to and credited upon the payment hereinabove stipulated to be made by said Cowland. It is further agreed that said Lawler and Wells shall retain and remain in possession of said property until the full payment of purchase price shall be made, and Cowland recognizes and agrees to such possession, and any and all use made of, by or on the part of the said Cowland shall be

considered as said Lawler and Wells' possession as aforesaid. Lawler and Wells shall not work the said property, nor operate the said mine, nor interfere with the use, working and operation of said Cowland. It is further agreed that if the said Cowland shall fail to make any of the payments as above stated, and shall fail to take and pay for said property as above stated, that all improvements made on said property and all development made thereon and therein, and all ores taken therefrom shall be the property of the said Lawler and Wells, and shall not be removed by the said Cowland, and the costs and expenses thereof shall in no manner be charged against said Lawler and Wells or against said property; that said Cowland shall have the right to work and operate the machinery and to use the property mentioned in said deed during the continuance of said contract and until the forfeiture thereof on his part; and in case of a forfeiture of contract on the part of said Cowland by failure to comply with any of the provisions thereof, or to make any payment as herein provided, then he agrees to at once surrender and deliver possession of said property to said Lawler and Wells."

On the 12th day of May, 1892, and contemporaneously with the execution of said agreement, a deed to the said Charles Cowland was executed by John Lawler and Ed. W. Wells and wife particularly describing the said Hillside group of mines, and conveying the same to Cowland for the purchase price of $450,000. Contemporaneously with the signing of said agreement and deed, the said H. H. Warner signed an instrument in writing, guaranteeing that the said Charles Cowland will carry out and perform the conditions of said agreement above referred to. Afterwards and on the same day, the agreement, deed and instrument of guarantee were by the said Warner, John Lawler and Ed. W. Wells deposited with the Bank of Arizona at Prescott, as the escrow holder thereof, in accordance with the terms, conditions and provisions contained in the said escrow agreement.

4. That while the escrow agreement and deed were executed in the name of Charles Cowland, the said Cowland was the agent of H. H. Warner, and Warner was the real party in interest in the transaction.

5. That the said escrow agreement, deed and guaranty were never recorded, but remained in the possession of the bank, as the escrow holder thereof, until November 10, 1893.

6. That at the time of the execution of said escrow agreement, "Exhibit A," and said deed, "Exhibit B," the defendants, John Lawler and Ed. W. Wells, knew that H. H. Warner contemplated the forming of a corporation to operate said group of

mines and eventually vest the title thereof in said corporation, in compliance with the terms of said escrow agreement.

7. That on or about the 15th day of May, 1892, John Lawler delivered to T. A. Rickard, as the agent of Charles Cowland, the occupation of said group of mines under the terms and conditions contained in the license embodied in said escrow agreement, "Exhibit A;" that from May 15, 1892, to the 15th day of June, 1892, the funds necessary to carry on the operations of said mines under the administration of said Rickard, were furnished by the H. H. Warner Investment Company, a corporation, of which the said H. H. Warner was during that time the president, the amount of which said funds does not appear in the evidence.

8. That on the 14th day of June, 1892, said H. H. Warner, Wm. M. Earl, Wm. R. Kennard, Francis B. Bowen and Charles Cowland incorporated, under the laws of the State of New Jersey, the Industrial and Mining Guaranty Company, with a capital of five hundred thousand dollars ($500,000), divided into five thousand (5,000) shares of the par value of one hundred dollars ($100) each, and on June 15, 1892, that corporation was organized with said incorporators as directors, with H. H. Warner as president; Wm. R. Kennard, vice-president; Wm. M. Earl, secretary, and Francis B. Bowen as treasurer; for the purpose of handling mines and industrial enterprises, buying and selling stock, etc., etc.

9. That on the 15th day of June, A. D. 1892, said Charles Cowland made and delivered to the Industrial and Mining Guaranty Company a written assignment of all his right, title and interest in and to the escrow agreement, "Exhibit A" aforesaid, a true copy of which said written assignment is attached to said answer and marked "Exhibit D;" that contemporaneously with the execution and delivery of said written assignment, "Exhibit D," the said Charles Cowland made and delivered to said Industrial and Mining Guaranty Company, a deed of conveyance, a true copy of which said conveyance is attached to said answer and marked "Exhibit F;" that contemporaneously with the execution and delivery of said assignment, "Exhibit D," and said conveyance, "Exhibit F," the said H. H. Warner made and delivered to said Industrial and Mining Guaranty Company a written consent to the making of said assignment and deed, "Exhibits D and F," a true copy of which said written consent is attached to said answer and marked "Exhibit E;" that at the time the said Industrial and Mining Guaranty Company took and received said assignment, "Exhibit D," said written consent, "Exhibit E," and said conveyance, "Exhibit F," from the said Charles Cowland, to-wit: On June 15,

1892, the said Industrial and Mining Guaranty Company had full knowledge and notice of the terms, conditions and provisions of the escrow agreement, "Exhibit A," aforesaid, and then and there by resolution of the board of directors of said Industrial and Mining Guaranty Company, the said Industrial and Mining Guaranty Company assumed all the covenants, conditions and agreements in the said escrow agreement, "Exhibit A," aforesaid, on the part of said Charles Cowland to be kept and performed; and further, by said resolution, said Industrial and Mining Guaranty Company promised to carry out and perform said escrow agreement, "Exhibit A," and all the terms, conditions and covenants therein contained, on the part of said Cowland to be performed, and make the payments for said mines, mining properties and other goods and chattels provided for in said escrow agreement, "Exhibit A," and procure said deed for the same, then in the hands of the Bank of Arizona.

10. That on the 15th day of June, 1892, the said T. A. Rickard delivered to the Industrial and Mining Guaranty Company the occupation of said Hillside group of mines, and on that day the said company entered into occupation of said group of mines with full knowledge and notice of the terms, conditions and provisions of the escrow agreement, "Exhibit A," aforesaid; that said company remained in occupation and operation of said Hillside group of mines from June 15, 1892, to and until the first day of October, 1892.

11. That on the 15th day of August, 1892, said H. H. Warner, William M. Earle, and one R. S. Hudspeth, as incorporators, incorporated the Seven Stars Gold Mining Company, under the laws of the State of New Jersey, with a capital of three million dollars ($3,000,000), divided into six hundred thousand (600,000) shares, of five dollars ($5) each, wherein, among other things, said corporation was authorized to hold, operate and convey mines; that afterwards, and on the 24th day of September, 1892, the said Seven Stars Gold Mining Company was organized by the election of the following-named directors, to-wit: Warner Miller, Hulbert H. Warner, J. Clifford Richardson, J. Herbert Jefferis, Arthur G. Yates, John W. Vrooman, B. E. Chase, Clinton B. Wiser, and Robert S. Hudspeth; with H. H. Warner as president, Robert S. Hudspeth as vice-president, and Harold J. Footner as secretary and treasurer.

12. That on the 10th day of September, 1892, the Industrial and Mining Guaranty Company, through its board of directors, by a resolution duly adopted, did offer to sell and convey all its right, title and interest in the following mining properties, a portion of which is described in the escrow agreement and deed, "Exhibits A and B" aforesaid, to-wit: The Seven Stars, Happy Jack,

Contact No. 1, and Contact No. 2, mines; also, the claim known as Camp and the locations known as Mescal, Elwood, Midnight, Waterfall and Boulder, to a company formed or to be formed, and known as the Seven Stars Gold Mining Company, upon said company showing that it had placed two hundred thousand dollars ($200,000) for working capital in its treasury, and upon receiving two million eight hundred thousand dollars ($2,800,000) in cash or stock of the Seven Stars Gold Mining Company.

13. That on the first day of October, 1892, the Industrial and Mining Guaranty Company placed the Seven Stars Gold Mining Company in the occupation of said Hillside group of mines, and on that day the latter company entered into said occupation, with full knowledge and notice of the terms, conditions and provisions contained in the escrow agreement, "Exhibit A," aforesaid, and with full knowledge and notice of the resolution of the board of directors of the Industrial and Mining Guaranty Company referred to in finding 12 herein.

14. That the Industrial and Mining Guaranty Company, acting as the duly authorized agent of the Seven Stars Gold Mining Company, under date of September 24, 1892, issued a prospectus known as the "American prospectus" in aid of and to promote the sale of the stock of the Seven Stars Gold Mining Company, a true copy of which said prospectus is attached to the original complaint herein and marked "Exhibit C;" that some 300,000 of said American prospectuses accompanied by a map and application for subscription to stock, copies of which are attached to the original complaint and likewise marked "Exhibit C," were circulated by mail throughout the United States, the circulation of which said prospectus and blanks commenced about the 20th of September, 1892.

15. That on October 3, 1892, the Industrial and Mining Guaranty Company, as the duly authorized agent of the Seven Stars Gold Mining Company, by a resolution of the board of directors of said Industrial and Mining Guaranty Company duly adopted, did authorize and direct an English prospectus to be issued, a true copy of which said prospectus is attached to the minutes of the Industrial and Mining Guaranty Company, under date of October 3, 1892, and contained in "Exhibit 73," attached to the deposition of John Griffin on file herein; that the prospectus in this paragraph mentioned was never circulated in England or elsewhere.

16. That a prospectus was issued and circulated in England without the authority of the board of directors of the Industrial and Mining Guaranty Company or of the Seven Stars

Gold Mining Company, a true copy of which said prospectus so circulated in England is attached to the original complaint herein and marked "Exhibit D;" this prospectus was prepared, supervised and circulated by Charles Cowland; the descriptive matter in this prospectus was based upon data furnished him by the officers of the Industrial and Mining Guaranty Company; the circulation of this prospectus commenced about the 5th day of October, 1892, and amounted to about 80,000 copies; accompanying each copy of this prospectus was a map and application for subscription for stock, true copies of which are attached to the original complaint herein and marked "Exhibit C;" neither John Lawler nor Ed. W. Wells had any knowledge or information that this prospectus had been or was being circulated in England, or had any knowledge or notice of its contents until some time in the month of October, 1893.

The distributed English prospectus was the same as was attached to the complaint. This prospectus as it there appears was approved by the directors of the industrial company, with this exception: The third paragraph of the prospectus approved read: "The mines are situated in the Eureka mining district, Yavapai county, Ariz.," while said paragraph of the prospectus as finally printed and distributed in England read: "The mines *owned by the company are* situated in the Eureka mining district, Yavapai county."

17. That on May 15, 1892, at the Hillside mines, the defendants, Lawler and Wells, caused to be delivered to Mr. T. A. Rickard a report previously made upon said mines, known in the evidence as the "Blauvelt report," together with a map of the underground workings of said mines as such workings then existed, known in the evidence as the "Blauvelt map;" also, copies of the smelter and milling returns of ores which had been previously shipped from said mines and reduced, known in the evidence as "Smelters' returns;" that on September 28, 1892, at the request of H. H. Warner, said John Lawler sent by express to H. H. Warner, at New York City, the originals of said smelter and milling returns.

18. That on August 27, 1892, defendant Wells visited the office of the Industrial and Mining Guaranty Company, at 41 Broadway, New York city, and while there had an interview with H. H. Warner, president of that company and of the Seven Stars Gold Mining Company; that during that interview nothing was said to Mr. Wells about the plans of the Seven Stars Gold Mining Company nor of the Industrial and Mining Guaranty Company, nor the issuance and circulation of any prospectus.

19. That the section of the underground workings shown upon the map accompanying the prospectus and being one of the "Exhibits C" attached to the original complaint, is a copy of the Blauvelt map, with the additions of the outlines of the underground workings made by T. A. Rickard, as the agent of Cowland, during his administration, and by the Industrial and Mining Guaranty Company during its operations of said property; that the original of the surface outlines of the mining claims and town site appearing upon said map, "Exhibit C," was prepared by Alexander O. Brodie, while in the employ of the Industrial and Mining Guaranty Company, and without the knowledge of Lawler and Wells; that the original Brodie map contained the outlines of all the mining claims described in the escrow deed, "Exhibit B," together with other mining claims bonded by said Industrial and Mining Guaranty Company, and located by said Brodie for the benefit of the Seven Stars Gold Mining Company; that the said map, "Exhibit C," contains an outline of only those mining claims and town site mentioned in the resolution of the Industrial and Mining Guaranty Company, dated September 10, 1892, and referred to in finding 12 herein, together with the Boulder, a claim bonded from Joe Howell, and claims located by Mr. Brodie for the benefit of the Seven Stars Gold Mining Company; and, together with the Hillside patented claims mentioned in said escrow deed, "Exhibit B;" that defendant Lawler, on his visit to New York, August 30, 1892, saw the original Brodie map hanging on the wall of the office of said companies in New York; that the original Brodie map of which defendants' map, "Exhibit A" in evidence, is a true copy, had endorsed thereon the words, to-wit: "Plat of the Hillside and Adjoining Claims;" and said quoted words were written upon the original draft of the distributed map, "Exhibit C," attached to the complaint; that afterwards, without the knowledge of said Lawler, said quoted words were before distribution, changed on said map, "Exhibit C," to the words, to-wit: "Map of group of mines belonging to the Seven Stars Gold Mining Company."

20. That on and between the 30th day of August, 1892, and the 3rd day of September, 1892, the defendant, John Lawler, was in the offices of the Industrial and Mining Guaranty Company in New York city and there became aware that an American prospectus was being prepared for circulation for the purpose of promoting the sale of the stock of the Seven Stars Gold Mining Company, and, that the facts and statements contained in the Blauvelt report and map and copies of smelters' returns, hereinbefore mentioned, were being used as a basis of the description

of the said Hillside group of mines to be contained in said proposed American prospectus.

21. That on October 28, 1892, H. H. Warner, in Prescott, represented to Lawler and Wells that he was unable to place securities that he held, in time to meet the payment of that portion of the purchase price falling due November 12, 1892; and, relying upon said representation and request of Warner, Lawler and Wells, on October 28, 1892, agreed to an extension of the time of payment under the agreement of May 12, 1892, and provided that the original agreement remain in full force, except as to said modification touching the time of payment.

22. That on May 8, 1893, H. H. Warner executed a general assignment of his property for the benefit of his creditors to Job E. Hedges.

23. That on May 11, 1893, Lawler and Wells, knowing of the assignment of Warner, executed an agreement with Charles Cowland, stipulating that the payment mentioned in the original escrow agreement as falling due on May 12, 1893, might be made by said Cowland as follows: $9,098 in cash, and $4,500 to be paid on the first day of June, 1893, and the like sum to be paid on the first day of each of the following months, viz: July, August, September, October and November, 1893.

24. That a part of the consideration for the execution of the written instrument "Exhibit K," attached to said answer, was the issuance and delivery to said defendants Lawler and Wells of $50,000 per value of the guaranteed capital stock of the Seven Stars Gold Mining Company and of the appointment of John Lawler as manager of the operations of said Hillside group of mines.

25. That on May 11, 1893, the defendant, John Lawler, was appointed by the Seven Stars Gold Mining Company, manager of the operations of said Hillside group of mines, and said defendant, John Lawler, on May 13, 1893, entered upon his duties as such manager.

26. On May 20, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money received from the sale of the stock of the Seven Stars Gold Mining Company.

27. Before July 25, 1893, Lawler had personal knowledge that persons were being induced orally to purchase stock in the Seven Stars Gold Mining Company by representations as to the merits of the mining property in question.

28. The Seven Stars Gold Mining Company had no property other than its interest in said mines and no source of income other than the sale of its stock.

29. That on the 18th day of August, 1893, the chancery court of the State of New Jersey, in a certain action for that purpose then pending in said court, duly appointed defendant, John Griffin, as receiver of said Industrial and Mining Guaranty Company and of the Seven Stars Gold Mining Company, and thereupon on that day the said John Griffin duly qualified and entered upon his duties as such receiver.

30. That the Seven Stars Gold Mining Company from and including October 1, 1892, until and including the 17th day of August, 1893, continuously occupied and operated the said Hillside group of mines under and by virtue of the occupation thereof so given to it by the Industrial and Mining Guaranty Company as aforesaid, with full knowledge and notice of the terms, conditions, privileges and provisions contained in the original escrow agreement, "Exhibit A" aforesaid.

Remittances to the Bank of Arizona for Lawler and Wells after November 1st, 1892, were placed to the credit of the Seven Stars Gold Mining Company.

31. That on September 1, 1893, neither Charles Cowland nor the said receiver nor the plaintiffs nor any one of them paid or offered to pay to Lawler and Wells the sum of $4,500, payable on that date, according to the terms and conditions of the said escrow agreement and modifications thereof; nor has Cowland, nor has any one for him paid said sum since said date; nor has Cowland, nor has any one for him paid or caused to be paid, any portion of any purchase-money of said property, falling due or payable on or after the first day of September, 1893, according to the terms and conditions of said escrow agreement of May 12, 1892.

32. That on the 10th day of September, 1893, the defendants, John Lawler and Ed. W. Wells, as owners of the legal title to the said Hillside group of mines, and claiming to exercise their rights under the original escrow agreement, "Exhibit A" aforesaid, and the amendments, "Exhibit I and K" attached to said answer, entered into possession of said Hillside group of mines and from thence forward to and until September 30, 1897, the day of the date of the appointment of the first receiver herein, continuously remained in the exclusive possession of said mines.

33. On the 10th day of November, 1893, the Bank of Arizona, as escrow holder of the escrow agreement and deed, dated May 12, 1892, at the request of Lawler and Wells, redelivered said deed, according to the terms of the said escrow agreement to the said Lawler and Wells.

34. That the defendants, John Lawler and Ed. W. Wells, had no knowledge or notice of the execution by Charles Cowland to the Industrial and Mining Guaranty Company, of the written assignment, "Exhibit D," the conveyance, "Exhibit F," the written consent thereto of H. H. Warner, "Exhibit E," and the resolution of the Industrial and Mining Guaranty Company accepting said instruments, as mentioned and described in finding 9 herein, until after the commencement of this suit.

35. That defendants, John Lawler and Ed. W. Wells, had no knowledge or notice of the adoption of the resolution of the Industrial and Mining Guaranty Company dated September 10, 1892, offering to sell a portion of the property in controversy with other property, to a company formed or to be formed and known as the Seven Stars Gold Mining Company and more particularly described in finding 12 herein, until after the commencement of this suit.

36. That on the 11th day of May, 1893, defendant John Lawler was, by the board of directors of the Seven Stars Gold Mining Company, appointed a director of said corporation to fill a vacancy then existing; that said Lawler never entered upon the duties of said office and had no knowledge or notice of said appointment until long after the commencement of this action.

37. That defendants John Lawler and Ed. W. Wells, in the month of October, 1892, became aware that the American prospectus, "Exhibit D" to the original complaint, was being distributed by the Industrial and Mining Guaranty Company.

38. That the defendants, John Lawler and Ed. W. Wells, or either of them or any person in their or either of their behalf did not at any time protest against the preparation or circulation of the prospectuses, maps and applications for subscriptions to stock herein mentioned, and they did not at any time or at all attempt in any way to give any notice of their rights in the Hillside group of mines to any of the plaintiffs or purchasers of the stock of the Seven Stars Gold Mining Company, except as such notice might be imputed to the said plaintiffs and stock purchasers through and by virtue of the recorded title in said defendants of the property in controversy, as in finding one herein set out.

39. That plaintiff, Clinton B. Wiser, was a director of the Seven Stars Gold Mining Company, and his name appeared on the prospectus as such director, and he assisted in the circulation of the American prospectus and in the sale of the stock of that corporation, and during all that time he had knowledge and notice that the title to the property in controversy was not vested in the Seven Stars Gold Mining Company.

40. That the Seven Stars Gold Mining Company duly authorized the Industrial and Mining Guaranty Company to act as its agent in the sale of stock, and all of the stock of the Seven Stars Gold Mining Company which was at any time sold under the American prospectus was so sold by the Industrial and Mining Guaranty Company, and the latter received from the stock purchasers all the moneys which were paid on account of the purchase price of such stock.

41. That as to stock sold under the American prospectus to American stock purchasers, every contract of sale and purchase of stock of the Seven Stars Gold Mining Company was conducted by the Industrial and Mining Guaranty Company on the one part, as sellers, and by the individual subscriber to said stock as purchaser, on the other part; that as to stock sold under the English prospectus in England, every contract of sale and purchase of said stock was conducted by Tarbutt & Quentin on the one part as sellers, and by the individual subscriber to said stock as purchaser, on the other part; and that neither John Lawler nor Ed. W. Wells was present at, nor a party to, any of said contracts.

42. That 21 out of a total aggregate numbering about 500 of the purchasers of stock of the Seven Stars Gold Mining Company have testified in this case; and, with the exception of witness Wiser, during all of the time of their and each of their (the said witnesses') dealings with the Industrial and Mining Guaranty Company in the purchase, subscription and payment for such stock:

(*a*) They each relied upon the statements contained in the prospectus and maps as distributed, and they believed from the reading of the same that the Seven Stars Gold Mining Company owned the mines and properties therein mentioned and referred to;

(*b*) All of the said witnesses, including witness Wiser, and with the exception of witness M. J. Riordan, did not then know either of the defendants, John Lawler or Ed. W. Wells; and

(*c*) That said witnesses, including witnesses Wiser and Riordan, did not before, or at the time of their said purchases, subscriptions or payments, have any communication with said defendants, or either of them, concerning any matter in issue herein.

43. That the subscribers to the stock of the Seven Stars Gold Mining Company did not at the time of their individual subscriptions to, or at the time of their several payments for said stock, have any knowledge or notice of any of the following matters:

(*a*) That Lawler and Wells on May 12, 1892, knew that

H. H. Warner proposed to form a corporation to operate said group of mines and eventually take the title thereto, as in finding 6 herein set forth;

(*b*) That said defendants had furnished the Blauvelt report and map, or the copies of and original smelters' returns as herein mentioned, or that the same were being, or had been, used as data for said prospectus, and the maps distributed therewith;

(*c*) That John Lawler and Ed. W. Wells had visited the offices of the Industrial and Mining Guaranty Company, in New York, in August and September, 1892, or of any matter or thing occurring thereat; or,

(*d*) That said defendants knew that said prospectus and maps were being distributed.

44. That the subscribers to the capital stock of the Seven Stars Gold Mining Company, in making their several subscriptions therefor and payments thereon, did so without any knowledge of and without relying on anything said or done, or omitted to be said or done, in the premises by the said Lawler and Wells or either of them.

45. That John Lawler and Ed. W. Wells did not, before or at the time of any subscriptions to the capital stock of the Seven Stars Gold Mining Company or payment on account of said subscriptions, make any representations to or communicate with any subscriber of said stock concerning any matter or thing in issue herein.

46. That from the gross proceeds of the operations of the Hillside group of mines during its operation by the Industrial and Mining Guaranty Company, there was deposited in the Bank of Arizona to the credit of Lawler and Wells on account of the purchase price of said property, in accordance with the terms of said escrow agreement, "Exhibit A" aforesaid, the sum of $19,987.61; that during the operations of said properties by the Seven Stars Gold Mining Company a like deposit was made for a like purpose, amounting to the sum of $47,812.25; aggregating in all $67,799.86.

47. That on May 12 and 24, 1892, H. H. Warner paid to the defendants, Lawler and Wells, on account of the purchase price of said property, the aggregate sum of $51,000; that there was paid on and between November 12, 1892, and August 4, 1893, to the defendants, John Lawler and Ed. W. Wells, on account of the purchase price of said property under the terms of the original escrow agreement, "Exhibit A" aforesaid, and the amendments "I and K" aforesaid, the aggregate sum of $112,399.96; and said

sum was credited to Lawler and Wells on the books of the Bank of Arizona on the dates and in the amounts as follows, to-wit:

Nov. 12, 1892,	Bank of Arizona.	$35,000
Nov. 12, 1892,	Park Nat. Bank, New York.....	23,500
Dec. 9, 1892,	Bank of Arizona.	7,000
Dec. 9, 1892,	Bank of Arizona.	12,500
Dec. 9, 1892,	Bank of Calif., San Francisco.....	12,500
Dec. 9, 1892,	Bank of Calif., San Francisco.....	4,500
Feb. 11, 1893,	Laidlaw & Co., New York.....	4,500
Feb. 11, 1893,	Bank of Arizona.	1,639.96
June 3, 1893,	Laidlaw & Co., New York.....	4,500
June 5, 1893,	Laidlaw & Co., New York.....	2,200
Aug. 4, 1893,	Bank of Arizona.	4,500

48. That the payments of November 12, and December 9, 1892, and on February 11 and June 5, 1893, were made in the following manner, to-wit: The treasurer of the Industrial and Mining Guaranty Company drew a check for each payment on its common fund in the Continental National Bank of New York, which said checks were payable as follows, to-wit: "To the order of Charles Cowland or Laidlaw & Company" (or, "to the order of Charles Cowland or the Park National Bank," as the case was;) "for telegraphic transfer to the Bank of California" (or, "the Bank of Arizona" as the case was) "for credit to Lawler and Wells on account of the Cowland contract," which said checks were collected by the payee and the moneys received therefrom, transmitted in the usual course of business to the Bank of Arizona and there placed to the credit of Lawler and Wells on account of the purchase price of said property, in accordance with the terms of the original escrow agreement, "Exhibit A," and the amendments thereof.

49. That during the life of the Industrial and Mining Guaranty Company it was engaged in promoting sundry mining, railroad and industrial enterprises, including the business transactions of the Seven Stars Gold Mining Company; that during the time it received and disbursed the sum of $824,142.13; that from June 15, 1892, to and including August 1, 1893, the moneys which it received and disbursed on account of its various enterprises were all deposited in its name in a common fund in the Continental National Bank of New York, and checked against, disbursed and used by said Industrial and Mining Guaranty Company in its various business enterprises as required therein, excepting the sum of $111,724.23, of which sum $67,799.86 were the gross proceeds of

ore from the Hillside group of mines, and the further sum of $43,924.37, which was composed of $224.37, moneys received prior to May 11, 1893, from the sale of Seven Stars stock, and the remainder from loans obtained by said company, subsequent to May 11, 1893.

50. That the defendants, John Lawler and Ed. W. Wells did not at any time, prior to the time of the commencement of this action, have any knowledge or notice that any moneys received by them on account of the purchase price of the Hillside group of mines as provided for in the original escrow agreement of May 12, 1892, came from or was the moneys or any part of the moneys which any one or more of the purchasers of the stock of the Seven Stars Gold Mining Company had paid in to the Industrial and Mining Guaranty Company on account of the purchase price of such stock.

51. That the defendants Lawler and Wells were not promoters of or in anywise interested in the organization of the Industrial and Mining Guaranty Company or of the Seven Stars Gold Mining Company, nor in the issuance or circulation of the prospectus, nor in the issuance and sale of the capital stock of either of said companies, or in the proceeds thereof.

52. No certificates of stock of the Seven Stars Gold Mining Company were ever issued on account of the stock subscriptions made in England.

53. That after the 11th day of May, 1893, the Industrial and Mining Guaranty Company received the sum of $500 and no more, on account of the sale of Seven Stars stock.

54. That the amount of moneys received by the Industrial and Mining Guaranty Company from the purchasers of guaranteed stock of the Seven Stars Gold Mining Company, was as follows: From the American subscribers, $131,859.52; from the English subscribers, $125,852.33; aggregating $253,128.05, of which $819.08 was returned by the Industrial and Mining Guaranty Company to certain of the stock subscribers to said guaranty stock, and their stock subscriptions cancelled, making the aggregate of money retained by the Industrial and Mining Guaranty Company from the sale of guaranteed stock, $252,308.97. There was received by the Industrial and Mining Guaranty Company, $2,583.80 from the sale by it of the common stock of the Seven Stars Gold Mining Company.

55. That on September 28, 1892, the Industrial and Mining Guaranty Company received its first moneys, amounting to $2,100, from the sale of the guaranteed stock, and during its operations of said Hillside group of mines prior to September 28, 1892, it had

paid out on account of the operating expenses of said property the sum of $21,004.50.

56. The Seven Stars Gold Mining Company at its New York office did not keep any books of account of receipts and expenditures of moneys, but all accounts of the receipts and expenditures of money in the operations and expenditures of the Industrial and Mining Guaranty Company and the Seven Stars Gold Mining Company during their respective operations of the Hillside group of mines, were kept by the Industrial and Mining Guaranty Company in its own books of account.

57. That the Industrial and Mining Guaranty Company, between the 15th day of June, 1892, and the 18th day of September, 1893, paid out for operating expenses, purchase of machinery, purchase price of the Hillside group of mines, dividends and other expenses—all connected with this enterprise—the aggregate sum of $380,295.81, which amounted to $127,986.84 more than the amount of moneys received by it from the sale of Seven Stars guaranteed stock, and $60,186.98 more that the aggregate amount of moneys received by it from the sale of Seven Stars guaranteed stock, and from the net proceeds of ore from the Hillside group of mines, paid into the Bank of Arizona on account of the purchase price of said mines.

58. That during the operations of the Hillside group of mines by the Seven Stars Gold Mining Company, there was expended by the Industrial and Mining Guaranty Company, for costs of operations, improvements, supplies and machinery, the sum of $112,411.32.

59. That the amount paid on account of machinery purchased and placed upon the Hillside group of mines by the Industrial and Mining Guaranty Company during the operations of the Seven Stars Gold Mining Company was the sum of $12,528.87, of which machinery to the value of $5,000 was sold under judicial sale by creditors of the Seven Stars Gold Mining Company after June 1, 1893.

60. That on and between January 18, 1893, and May 10, 1893, the Industrial and Mining Guaranty Company paid out as and for dividends on stock sold of the Seven Stars Gold Mining Company, the sum of $11,533.07 to the then various holders of the capital stock of the Seven Stars Gold Mining Company.

61. That the stockholders, nor any one of them, did not, before the commencement of this suit return, or offer to return, to the Seven Stars Gold Mining Company his stock, or any part thereof; and said stockholders nor any one of them, did not, prior to the commencement of this action, return or offer to return, his

or their portion of the dividends received by him or them from the Industrial and Mining Guaranty Company.

62. That there never was any meeting duly called and held of the stockholders of said Seven Stars Gold Mining Company; that on April 4, 1894, several stockholders representing themselves and about 300 other stockholders, voluntarily met at Jersey City, N. J., and there made demand upon John Griffin, receiver, as aforesaid, to commence this suit, and he refused so to do.

63. That on and between September 10, 1893, and September 30, 1897, John Lawler and Ed. W. Wells received from the operations of said Hillside group of mines the sum of $37,376.86, and disbursed in such operations during that time, the sum of $35,658.93.

64. That between the 17th day of November, 1893, and the time of commencing this action, the plaintiffs, or said receiver, or any one of them, or either of them, did not make any demand upon said John Lawler and Ed. W. Wells, or either of them, for the possession of the properties in controversy herein, or any part thereof.

WEBSTER STREET, *C. J.*,
FLETCHER M. DOAN, *A. J.*,
GEO. R. DAVIS, *A. J.*,
Supreme Court, Territory of Arizona.

No. 651. In the Supreme Court of the Territory of Arizona. *Wiser, et al.* v. *Lawler, et al.*, Findings of Fact. Filed March 23d 1901.

THOMAS GRINDELL, Clerk.